Supreme Court, U.S.
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No. 95-706

In The

Supreme Court of the United States

October Term, 1995

THE BABCOCK & WILCOX COMPANY, *et al.*,

v. *Petitioners,*

ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN INTERNATIONAL MARINE AGENCY; ALLIANZ INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; CARYL VAUGHN GIBBS, INDIVIDUALLY AND ON BEHALF OF CERTAIN UNDERWRITERS OF LLOYDS OF LONDON; INDEMNITY MARINE ASSURANCE COMPANY LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.; INSURANCE COMPANY OF NORTH AMERICA (UK) LTD.; AND C.A. PARR,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Contrary to the law of every other Circuit that has addressed this question, may the United States Court of Appeals for the Sixth Circuit adopt a rule permitting the grant of a defendant's motion for summary judgment and dismissal of a plaintiff's case pursuant to Fed. R. Civ. P. 56: (i) merely because the plaintiff has not satisfied the affirmative burden raised by its own summary judgment motion; and (ii) without any prior notice having been given to the plaintiff that the ultimate dispositive issue could serve as the basis for the dismissal?

2. Should this Court address the failure of the Sixth Circuit, as well as that of other Circuit Courts of Appeals, to follow this Court's rule, set forth in *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967), requiring that a federal court sitting in diversity jurisdiction and predicting state law in the absence of direct state supreme court precedent give presumptive weight to other relevant decisional law of that state?

PARTIES TO THE PROCEEDING AND AFFILIATIONS

The petitioner is Plaintiff-Appellant, The Babcock & Wilcox Company. Third-Party Defendant-Appellant, McDermott, Inc., and Defendant-Appellant, Creole Insurance Company, Limited, join in this petition. The respondents are listed on the caption of the case.

The Babcock & Wilcox Company is a wholly owned subsidiary of Babcock & Wilcox Investment Company, which is a wholly owned subsidiary of McDermott, Inc., a corporation which has issued publicly traded securities. McDermott, Inc. is a subsidiary of McDermott International, Inc., a publicly owned corporation. Creole Insurance Company Limited is a wholly owned subsidiary of McDermott International, Inc., and an affiliate of McDermott, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Babcock & Wilcox Company ("B&W"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. McDermott, Inc. ("McDermott") and Creole Insurance Company Limited ("Creole") join in this petition.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1-14, is reported at 53 F.3d 762 (6th Cir. 1995). The opinion and order of the district court, App. 15-37, are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 17, 1995. The Petitions For Rehearing and Suggestion For Rehearing En Banc of Plaintiff-Appellant, The Babcock & Wilcox Company, and Third-Party Defendant-Appellant, McDermott, Inc., and Defendant-Appellant Creole Insurance Company Limited were denied on August 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL RULE AND STATUTE INVOLVED

Fed. R. Civ. P. 56. Summary Judgment

* * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

28 U.S.C. § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

1. ***Background***. For over sixty years, B&W has designed, manufactured, installed, delivered and maintained industrial utility and marine boilers throughout the United

States and the world. During most of this period, B&W had a continuous corporate practice and policy of approving or permitting the use of asbestos-containing materials as components in the design, assembly, installation and servicing of its boilers.

Like many other industrial entities whose historical operations or products involved asbestos-containing materials and that did not recognize the associated dangers, B&W is currently facing staggering liabilities from persons claiming injury as a result of exposure to these materials. To date, tens of thousands of asbestos-related personal injury claims have been asserted against B&W, along with numerous other parties alleged to be responsible for the claimants' exposure to asbestos. B&W has incurred hundreds of millions of dollars in asbestos-related liabilities in the form of payments made to the asbestos claimants, with a significant number of unresolved claims still pending against B&W.

In response to the staggering asbestos-related liabilities confronting it, B&W has turned to its historical liability insurers for coverage. Both B&W's primary-layer liability insurers and the great majority of its excess layer insurers, which provided coverage to B&W beginning in 1950, have agreed to pay substantial sums to indemnify B&W for a significant portion of those liabilities. Nevertheless, the Defendant-Respondent insurers, which subscribe to a first-layer excess liability policy providing coverage to B&W for the 1979-80 policy period ("the Subscribers"), have refused to pay any of their policy limits to indemnify B&W.

The Subscribers' 1979-80 policy (the "Subscriber Policy") contains a $2.5 million per-occurrence buffer layer provision. This provision, in effect, provides that the Subscriber Policy will cover, up to its limits, all liabilities arising out of any one "occurrence" taking place during the policy period, to the extent those liabilities exceed a $2.5 million per-occurrence deductible.

The dispute in this case – not one that ordinarily would or should consume the time and resources of this Court – centers around the application of this buffer-layer provision to the large group of asbestos claims at issue. B&W has contended that these asbestos claims arise out of one common, causative "occurrence" and, thus, the amount of liability for all of the claims, when added together, well exceeds the $2.5 million per-occurrence deductible. By contrast, the Subscribers take the position that each of the tens of thousands of asbestos claims arises out of a separate and distinct causative "occurrence" and, therefore, because the value of no one claim exceeds the $2.5 million threshold, no coverage is provided by their Policy.

2. ***Proceedings Below***. On May 22, 1991, B&W filed this action for declaratory judgment and breach of contract against the Subscribers in the United States District Court for the Northern District of Ohio. In a preliminary ruling, the district court held that the law of Ohio applied to this case and, in particular, to the interpretation and application of the Subscriber Policy. App. 67. Following discovery, the parties filed cross-motions for summary judgment on the issue of how many occurrences were represented by the group of asbestos claims against B&W (the "number of occurrences" issue). On August 19, 1993,

the district court entered an opinion and order granting Defendants' motion for summary judgment and dismissing B&W's case.

The district court's opinion never addressed the single issue – the number-of-occurrences issue – that was presented in the parties' cross-motions for summary judgment. Rather, the district court addressed only an analytically distinct issue, *i.e.*, whether the 1979-80 policy period of the Subscriber Policy was "triggered" by the asbestos claims at issue (the so-called "trigger of coverage" issue). The trigger-of-coverage issue had never been presented to the court by Defendants' motion for summary judgment. Nonetheless, the district court granted Defendants' summary judgment on this issue and dismissed B&W's case, without B&W having been afforded the opportunity to present evidence on, and properly brief, the issue. In a word, B&W had been ambushed.

The stated basis for the district court's ruling was that B&W had not satisfied its affirmative burden of proving that the policy period of the Subscriber policy had been triggered. Yet, the district court committed clear error when it ruled, not that B&W's own summary judgment motion would be denied and the case would proceed to trial, *but rather that Defendants' cross-motion for summary judgment would be granted on an issue not presented by that motion*. App. 35. The critical error in this ruling, and the resulting fundamental unfairness to B&W, is patently obvious: B&W's case was dismissed on cross-motions for summary judgment on a dispositive issue that the parties, particularly the Subscribers, never raised in their cross-motions and about which the district court never gave notice to B&W that it could serve as the basis

for dismissing B&W's case. At best, B&W had only been notified that its motion would be denied and the case would proceed to trial if it did not come forward with sufficient evidence on the trigger-of-coverage issue.

In presenting its appeal of the district court's ruling to the United States Court of Appeals for the Sixth Circuit, B&W requested correction of the manifest procedural error in the court's grant of the Subscribers' summary judgment motion and also requested that the Sixth Circuit address the one and only issue that had been presented by the parties' cross-motions for summary judgment but that had not been decided by the district court – the number-of-occurrences issue. The Sixth Circuit chose to do the latter but not the former.

Specifically, the Sixth Circuit acknowledged but rejected B&W's argument that it had not been given prior notice that the trigger-of-coverage issue could be the basis for dismissal of its case. App. 5-6. Nonetheless, in the course of rejecting B&W's argument and upholding the district court's ruling, the Sixth Circuit actually highlighted the validity of B&W's argument. Indeed, after searching thoroughly through the district court record for the document that supposedly placed B&W on notice that Defendants' summary judgment motion would be granted if B&W did not come forward with sufficient evidence on the trigger-of-coverage issue, the Sixth Circuit was able to identify only one document: "Defendants' Reply Memorandum in Opposition to Summary Judgment Motions of B&W and McDermott." App. 5. This document related to Defendants' opposition to *B&W's* motion, not to the *Subscribers'* motion. Thus, the Sixth Circuit opinion, while rejecting B&W's appeal, actually

serves to reinforce B&W's argument that neither the Defendants nor the district court gave B&W any notice that the trigger issue could be the basis for a grant of Defendants' summary judgment motion.

Recognizing the tenuous basis of its decision, the Sixth Circuit provided an alternative, independent basis for rejecting B&W's appeal – namely, the Court decided to address the number-of-occurrences issue that had been presented to the district court but had not been decided. In ruling adversely to B&W on this issue, the Sixth Circuit committed its own glaring error that contravened the directives of prior Supreme Court precedent. Specifically, although the Sixth Circuit was sitting as an *Erie* court with jurisdiction based on diversity of citizenship, the Court did not attempt to predict how the highest court of Ohio would decide the issue as required by this Court's precedents; rather, it decided the issue as a matter of federal common law. App. 9-14.

There were no existing decisions of the Ohio Supreme Court squarely deciding the number-of-occurrences issue. Nonetheless, the Sixth Circuit disregarded the decisions of lower Ohio courts and federal courts applying Ohio law to the number-of-occurrences issue. It also failed to consider the principles of Ohio insurance law that repeatedly have been espoused by the Ohio Supreme Court and that should have been outcome-determinative. Instead, the Sixth Circuit merely considered and adopted decisions on the issue by several out-of-state federal district courts, without ever attempting to determine if the analytical underpinnings of those decisions were consistent with the principles of Ohio insurance law.

Following the Sixth Circuit's issuance of its decision upholding the district court's grant of the Subscribers' summary judgment motion, B&W (as well as McDermott and Creole) filed with that Court Petitions For Rehearing And Suggestion For Rehearing En Banc. On August 4, 1995, the Sixth Circuit denied the petitions without further explanation of its decision. App. 68-69.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's affirmance of the district court's grant of the Subscribers' motion for summary judgment, if left undisturbed, will (i) create a conflict among the Circuits on long-settled principles of summary judgment practice under Fed. R. Civ. P. 56; and (ii) contribute to the federal courts' increasing failure to abide by this Court's prior directives under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967), regarding the "proper regard" to be accorded state lower-court decisions. Because this decision has such far-reaching adverse effects, it warrants review by this Court.

1. The Sixth Circuit's Affirmance Of The Grant Of The Subscribers' Motion For Summary Judgment Is A Radical Departure From Precepts Of Summary Judgment Practice That, If Left Uncorrected, Will Create A Conflict Among The Circuits.

The Sixth Circuit's erroneous affirmance of the district court's grant of the Subscribers' motion for summary judgment squarely rejects two fundamental principles of

federal summary judgment practice that have been adopted by this Court as well as the Courts of Appeals for other Circuits.

First, the affirmance is contrary to the rule adopted by other Courts of Appeals that, where cross-motions for summary judgment have been filed, one moving party's failure to establish its entitlement to judgment as a matter of law should not result in a judgment in favor of the cross-movant.[1] The Sixth Circuit's decision is inconsistent with the principle that the filing of cross-motions for summary judgment does not reflect the parties' consent to the resolution of the case on the existing record and does not grant the district court the freedom to treat the case as though it had been submitted for final resolution on a stipulated record.[2]

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[1] *E.g., Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993); *LewRON Television, Inc. v. D.H. Overmyer Leasing Co.*, 401 F.2d 689, 692 (4th Cir. 1968), *cert. denied*, 393 U.S. 1083 (1969); *Mitchell v. McCarty*, 239 F.2d 721, 723 (7th Cir. 1957); *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir. 1975); *Houghton v. Foremost Fin. Servs. Corp.*, 724 F.2d 112, 114 (10th Cir. 1983); *Latecoere Int'l, Inc. v. United States, Dep't of Navy*, 19 F.3d 1342, 1366 (11th Cir. 1994); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

[2] *E.g., Boston Five Cents Sav. Bank v. Secretary of Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985) (Breyer, J.); *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968); *John v. Louisiana*, 757 F.2d 698, 705 (5th Cir. 1985); *Wermager v. Cormorant Twp. Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983); *Sherwood v. Washington Post*, 871 F.2d 1144, 1147-48 (D. D.C. 1989). *See* 6 James W. Moore et al., *Moore's Federal Practice* ¶¶ 56.04[1], 56.13 (2d ed. 1994).

In this case, the only issue raised by Subscribers' summary judgment motion seeking dismissal of B&W's case was the number-of-occurrences issue. The district court did not grant the motion based on that issue. Rather the district court granted Subscribers' motion based on a distinct issue – the trigger-of-coverage issue – that at best was mentioned only in the context of B&W's affirmative motion seeking summary judgment in its favor. The Sixth Circuit's decision upholding the district court's dismissal of B&W's case places the Sixth Circuit at odds with each of the other Circuit Courts of Appeals that has considered this procedural issue. Accordingly, if a dismissal by a district court on these same facts had been reviewed in any other such Circuit, the dismissal would have been vacated with directions to the district court to deny each of the parties' cross-motions for summary judgment and to proceed to trial.

Second, assuming *arguendo* that the trigger-of-coverage issue was raised at all by the Subscribers' briefing on cross-motions for summary judgment, then the Sixth Circuit's affirmance of the district court's dismissal rejects the rule adopted by this Court, and followed by every other Circuit Court of Appeals considering the issue, that adequate notice must be provided to a party before the entry of summary judgment against it. *See Fountain v. Filson*, 336 U.S. 681, 683 (1949). In this case, the only arguable notice that was provided to B&W of the potentially dispositive trigger-of-coverage issue was that contained in a *reply* brief entitled "Defendant Subscribers' Reply Memorandum in Opposition to Summary Judgment Motions of Babcock & Wilcox and McDermott." This reply brief, which relates to B&W's affirmative summary

judgment motion, does not satisfy the well-established rule requiring notice to a party prior to the entry of summary judgment against it, a rule that has been embraced by Fed. R. Civ. P. 56 and every other Circuit Court of Appeals that has considered the issue.[3]

By its decision, in this case, the Sixth Circuit has now seemingly established a new and conflicting rule that any statement of an issue, wherever contained in *any* pleading or brief, can constitute notice to a party sufficient to permit entry of summary judgment on that issue. The manifest unfairness of such a rule in this case is highlighted by the fact that, before the hearing on B&W's and Subscribers' respective cross-motions for summary judgment, the district court had ruled expressly that the only pending motions that it would entertain were those dealing with the number-of-occurrences issue. App. 40 (cross-motions deal with "defining a single occurrence under the policy").

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[3] *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("notice" required); *Stella v. Town of Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993) ("adequate notice" required); *Trusthouse Forte, Inc. v. 795 Fifth Ave. Corp.*, 756 F.2d 255, 259 (2d Cir. 1985) ("notice" required); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 154 (3d Cir. 1985) ("notice" required), *cert. denied*, 484 U.S. 1043 (1988); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 n.3 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 444-45 (5th Cir. 1991) ("proper notice" required); *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993) ("notice" required); *Hubbard v. Parker*, 994 F.2d 529, 531 (8th Cir. 1993) ("sufficient advance notice" required); *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994) ("notice" required); *National Fire Ins. v. Bartolazo*, 27 F.3d 518, 520 (11th Cir. 1994) ("notice" required); *see Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1164 (Fed. Cir. 1993) ("notice" required).

The new rule embraced by the Sixth Circuit is also squarely in conflict with the majority rule that a party may be subjected to an entry of summary judgment pursuant to an adverse party's motion only upon issues raised in that motion, and not upon issues raised in other contexts or not raised at all. As stated succinctly by the Seventh Circuit, "[w]hen a party moves for summary judgment on ground A, his opponent is not required to respond to ground B – a ground movant might have presented but did not." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (citing *Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988); *John Deere Co. v. American Nat'l Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987)).[4]

Indeed, in a decision reviewing a district court's procedural error on summary judgment that is directly on point with the one committed by the district court in this case, the Tenth Circuit held that it was "unfair" to affirm the summary judgment against the plaintiff when the defendant-government only raised the issue upon which summary judgment was granted in a brief opposing plaintiff's motion for summary judgment and not in the defendant-government's own affirmative motion for summary judgment. *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994); *see also, e.g., Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986) (reversing grant of

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[4] *Accord Morales Morales v. Rafael Arias*, 856 F.2d 396, 397 (1st Cir. 1988); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994).

summary judgment in favor of defendant when dispositive issues were only raised in plaintiff's earlier briefs in opposition to motion to dismiss).[5]

Accordingly, other Circuit Courts of Appeals that have considered the issue do not permit a district court to grant a party's motion for summary judgment on grounds that are not raised by the moving-party's motion but rather are raised by the moving party in some other procedural context. By contrast, in the Sixth Circuit, a party may be subjected to an adverse summary judgment on an issue without ever having been apprised that it must come forward with evidence creating a triable issue of fact on that issue.

Moreover, if the district court's entry of summary judgment in this case is deemed to have been a judgment entered *sua sponte* rather than one upon Subscribers' motion, then the Sixth Circuit's decision creates a conflict as to the rule adopted by other Circuits that, when summary judgment is entered *sua sponte*, any doubts as to the adequacy of the notice should be resolved in favor of the losing party. This rule has been expressly adopted by both the First and Fifth Circuits. *See Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1561 (1st Cir. 1989); *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965 (5th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992). The foregoing rule is an extension of the principle that *sua sponte* entry of summary judgment should be employed only with great care and circumspection. *E.g., Bonilla v. Nazario*, 843 F.2d

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[5] *See also Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990) (reversing district court's grant of summary judgment pursuant to a motion *in limine*).

34, 37 (1st Cir. 1988) (Breyer, J.) (quoting 10A C. Wright, et al., *Federal Practice & Procedure*, § 2720 at 34 (1983)); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 154 (3d Cir. 1985), *cert. denied*, 484 U.S. 1043 (1988).

Finally, the Sixth Circuit's new rule is also squarely contrary to a central purpose of the Federal Rules of Civil Procedure – to prevent litigation by ambush. *See N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 253 (1978); *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1171-72 (1st Cir. 1995). Accordingly, this Court should grant certiorari to strike down this rule and to restore uniformity in the federal courts as to the requirements for adequate notice to a party prior to the entry of summary judgment against that party.

2. The Sixth Circuit's Decision Is Contrary To Prior Directives Of This Court And Widens The Conflict Among The Circuits On The Issue Whether A Federal *Erie* Court Should Give Presumptive Deference To Relevant Decisional Law On A State-Law Issue In The Absence Of Direct State Supreme Court Precedent.

This Court has characterized its decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Unfortunately, the Sixth Circuit and several other Courts of Appeals are undermining the well-established *Erie* doctrine by the manner in which they purport to ascertain a state's law on an issue in the absence of any direct

state supreme court precedent on the issue. This Court, in *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967), has set forth the procedure to be applied in such a situation. Specifically, this Court has stated:

> If there be no decision by [the State's highest] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Id. at 465. Moreover, as *Bosch* reaffirmed, "proper regard" requires that a federal court predicting state law under *Erie* treat a lower state court decision as " 'a datum for ascertaining state law *which is not to be disregarded . . . unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*' " *Id.* (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); final emphasis by the *Bosch* Court).[6]

Notwithstanding this clear direction, the Sixth Circuit's decision in this case implicitly rejects the mandate of *Bosch* and adopts the following *alternative* rule for a federal court ruling on an issue of state law: When there is no direct state supreme court precedent on an issue, the federal court need not give any deference to the decisions of lower courts interpreting the state's law on the relevant issue; nor must it pay any regard to the state's general jurisprudential principles that govern the subject matter of the dispute, even as set forth by the state supreme court. In short, the Sixth Circuit has determined

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[6] *See also Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 630 n.3 (1988) (quoting with approval *West*, 311 U.S. at 237-38).

that, in the absence of direct state supreme court precedent, a federal court may pick and choose any decisional law from around the nation, regardless of the particular state law that it purports to apply. The nationalization of insurance law may or may not be a laudable goal. Nonetheless, the worthiness of this goal, and the manner in which it is to be achieved, are not matters for the federal courts to decide.

In this case, in supporting its ruling on the number-of-occurrences issue, the Sixth Circuit did not rely upon a single case from an Ohio court or upon a single decision of another court applying Ohio law. The court summarily (and erroneously) distinguished all of the decisions cited by B&W that applied Ohio law to the number-of-occurrences issue, without making any attempt to apply the principles of Ohio insurance law supporting those decisions to the policy language at issue. The court also made no effort to test its ultimate ruling – or the rulings of the non-Ohio cases on which it relied – against the general principles of Ohio insurance law that should govern this case.[7] Instead, the court went through the entire body of national case law "cafeteria-style," supporting its ruling

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[7] Some of the Ohio insurance principles ignored by the Sixth Circuit in ruling on the number-of-occurrences issue are that: (i) ambiguities in policy language are to be construed in favor of the insured, and (ii) any limitations or qualifications on coverage are to be interpreted narrowly and with the presumption that any risk that is not clearly excluded is covered. *See, e.g., Faruque v. Provident Life & Accident Ins. Co.*, 508 N.E.2d 949, 952 (Ohio 1987); *Moorman v. Prudential Ins. Co. of Am.*, 445 N.E.2d 1122, 1124-25 (Ohio 1983); *Buckeye Union Ins. Co. v. Price*, 313 N.E.2d 844, 846 (Ohio 1974).

with three decisions from non-Ohio federal courts – two decisions from the Eastern District of Pennsylvania, and one decision from the Western District of Virginia. *See* App. 10-12.[8]

To have followed *Bosch* and accorded "proper regard" to the Ohio rules of decision in resolving the number-of-occurrences issue in this case, the Sixth Circuit should have (i) considered the one Ohio lower-court decision on the same issue[9] and determined that the analytical underpinning of that decision was squarely applicable in this case; (ii) reviewed federal court decisions applying Ohio law to this issue[10] to understand the Ohio insurance law principles that guided those decisions; (iii) analyzed the general principles of insurance law espoused by the Ohio Supreme Court that were relevant to deciding the

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[8] Compounding its error, the Sixth Circuit misapplied the teachings of the three cases upon which it relied. In each case, the district court was construing policy language that it concluded was ambiguous. *See Norfolk & Western Ry. Co. v. Accident & Casualty Ins. Co.*, 796 F. Supp. 929, 936 (W.D. Va. 1992), *dismissed in relevant part as moot*, 41 F.3d 928 (4th Cir. 1994); *Pittsburgh Corning Corp. v. Travelers Indem. Co.*, No. Civ. A. 84-3985, 1988 WL 5302, at *2 (E.D. Pa. Jan. 21, 1988); *Northern Shipping Co. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 617 F. Supp. 136, 138 (E.D. Pa.), *aff'd*, 774 F.2d 1152 (3d Cir. 1985). As such, under controlling principles of Ohio law, *see supra* n.7, these decisions actually support a ruling in favor of the policyholder.

[9] *See Morton Thiokol, Inc. v. Aetna Casualty & Sur. Co.*, No. A-8603799, slip op. (Ohio Com. Pls. Dec. 28, 1988), *reprinted in* 3 Mealey's Litig. Reps. – Ins. § B (Jan. 11, 1989).

[10] *See International Surplus Lines Ins. Co. v. Certain Underwriters at Lloyd's of London*, 868 F. Supp. 917 (S.D. Ohio 1994); *Owens-Illinois, Inc. v. Aetna Casualty & Sur. Co.*, 597 F. Supp. 1515 (D. D.C. 1984).

number-of-occurrences issue[11]; and (iv) reviewed the caselaw on the issue from around the nation that arises from the same principles of insurance law as those found in decisions of the Ohio Supreme Court, the overwhelming majority of which support B&W's position.[12] All of the foregoing authority was provided to the Sixth Circuit by B&W in its briefs, and all of it was seemingly ignored.

The Sixth Circuit's practice of ignoring the dictates of *Bosch* and disregarding relevant, lower state-court decisional law is not a unique phenomenon among the Courts of Appeals. For example, the Second Circuit has indicated that "proper regard" under *Bosch* may require merely a passing acknowledgement of lower state-court decisions and that such decisions may be of no more value in predicting how the state's highest court would rule on an issue than the federal court's exercise of its own judgment, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1190-91

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[11] *See supra* n.7.

[12] *See, e.g., Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502, 505-06 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982); *Michigan Chem. Corp. v. American Home Assurance Co.*, 728 F.2d 374, 379 (6th Cir. 1984); *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 432-33 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3599 (1995); *Associated Indem. Corp. v. Dow Chem. Corp.*, 814 F. Supp. 613, 621 (E.D. Mich. 1993); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 773 (E.D. Pa. 1989), *modified*, No. Civ. A. 86-7501, 1989 WL 73656 (E.D. Pa. June 30, 1989), *aff'd in part and vacated and remanded on other grounds*, 25 F.3d 177 (3d Cir. 1994); *Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (JSM), 1992 WL 123144, at *13 (S.D.N.Y. May 27, 1992), *appeal pending*.

(2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992), or decisions from other jurisdictions, *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994). Similarly, the Court of Appeals for the Ninth Circuit has evidenced a similar disregard of this Court's direction on the subject,[13] suggesting that lower state court decisions are " 'merely data' " providing "guidance" to a federal court, *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986) (quoting *American Sheet Metal, Inc. v. Em-Kay Eng'g Co.*, 478 F. Supp. 809, 813 (E.D. Cal. 1979)), *modified in part on other grounds*, 810 F.2d 1517 (9th Cir. 1987), and that they are entitled to no more weight than decisions from other jurisdictions, *see State Farm Mut. Auto. Ins. Co. v. Davis*, 937 F.2d 1415, 1418 (9th Cir. 1991); *Dimidowich*, 803 F.2d at 1482. In fact, the Ninth Circuit has gone so far as to state that, ultimately, it need use only its own best judgment in predicting state law. *General Motors Corp. v. Doupnik*, 1 F.3d 862, 865 (9th Cir. 1993); *see Davis*, 937 F.2d at 1418.

By contrast, the Third Circuit has remained faithful to *Bosch's* "proper regard" standard by requiring a federal court to search thoroughly and give preeminence to lower court decisions, "at least in the absence of convincing evidence [that] the state supreme court would not follow them," *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1049 (3d Cir.), *cert. denied*, 114 S. Ct. 440 (1993), and by requiring that the federal court "be sensitive to the

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[13] Indeed, the Ninth Circuit appears to believe, erroneously, that it "is open to some question" whether *Bosch* requires that even decisions of intermediate appellate courts be followed absent other persuasive contrary authority. *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 390 n.2 (9th Cir. 1988). This belief is clearly incorrect. *See Bosch*, 387 U.S. at 465.

doctrinal trends of the state" and "the policies which inform the prior adjudications by the state courts," *Becker v. Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978), *abrogated on other grounds by Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237 (3d Cir. 1993).

Other Circuit Courts of Appeals, including the First, Fourth, Fifth and Eleventh, have joined the Third Circuit in according proper deference to a state's lower-court decisions and relevant jurisprudential principles in the absence of direct state supreme court precedent. *See, e.g., CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77, 88-89 (1st Cir. 1992); *United States v. Little*, 52 F.3d 495, 498 (4th Cir. 1995); *Sifers v. General Marine Catering Co.*, 892 F.2d 386, 397 & n.46, *modified in part on other grounds*, 897 F.2d 1288 (5th Cir. 1990); *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, 820 (11th Cir. 1985); *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir. 1982).

The conflict and inconsistency among the federal Circuits in the application of the *Bosch* "proper regard" standard has been well-documented and widely criticized. One scholarly commentator, reviewing hundreds of federal appellate opinions in diversity cases, reached the "explicit and disquieting" conclusion that "the *Erie* decision is being frequently ignored or avoided." David A. Thomas, *The Erosion of Erie in the Federal Courts: Is State Law Losing Ground?*, 1977 B.Y.U. L. Rev. 1, 2 (noting that nearly a quarter of all diversity cases in federal courts of appeals may have contained a misapplication or non-application of state law, in contravention of *Erie*). Many other commentators have identified this same problem,

noting time and again the uncertainty surrounding federal courts' determination of state law rules of decision. *See, e.g.*, Geri J. Yonover, *A Kinder, Gentler Erie: Reining In the Use of Certification*, 47 Ark. L. Rev. 305, 307 (1994); Richard D. Freer, *Erie's Mid-Life Crisis*, 63 Tul. L. Rev. 1087, 1089, 1091 (1989); Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DePaul L. Rev. 1, 3-8, 40-42 (1989); Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law: Factors, Etc., Inc. v. Pro Arts, Inc.*, 1982 Duke L.J. 704, 705.[14]

In addition, this Court's own certiorari docket also demonstrates that this problem is a recurring one. Questions about the procedure for ascertaining state law under the *Erie* doctrine have been presented to the Court at least thirty times since 1970.[15]

In short, this Court's prior directive in *Bosch*, setting forth the "proper regard" and presumptive weight to be accorded other relevant state decisional law in the absence of direct state supreme court precedent, is being routinely ignored in several Circuit Courts of Appeals, including the Sixth Circuit. Moreover, even those courts that are purporting to follow *Bosch* are doing so in conflicting and inconsistent manners. As a result, disarray on

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[14] *Cf.* Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 Or. L. Rev. 781, 784 (1992) (reviewing over 900 tax cases and rulings citing *Bosch* and finding "a quarter century of disarray caused by a misreading of the *Erie* underpinnings of the 'proper regard' standard.").

[15] A non-exhaustive list of petitions for certiorari raising questions about lower courts' determinations of state law is set forth in the Appendix. App. 70-72.

this issue among the Circuits has developed over the past quarter-century. This Court should put an end to this cacophonous din.

Frequent misapplications of the *Bosch* rule by federal courts pose a serious threat to fundamental principles of federalism, and risk undermining the entire *Erie* doctrine. As a result of misconstruing the *Bosch* standard, federal courts often are engaging in the type of *ad hoc* decision-making that was prevalent under the *Swift v. Tyson* regime and that the Court in *Erie* so strongly criticized. *Erie*, 304 U.S. at 78 (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)). Today, however, instead of invoking "general law" to reach desired results, many federal courts are making "predictions" as to state law that are (explicitly or implicitly) nothing more than a reflection of their own views as to what a state's law ought to be, divorced from the jurisprudential traditions of the particular state. The natural and inevitable outgrowth of such a freestyle judicial inquiry is the "debilitating uncertainty in the planning of everyday affairs," *see Hanna v. Plumer*, 380 U.S. at 474 (Harlan, J., concurring), and the forum-shopping by federal litigants that *Erie* was intended to prevent.

Federal courts' current freedom to fashion *ad hoc* results, under the guise of predicting state law, also is shifting the balance of power struck by *Erie* significantly toward the federal courts and away from the states. Just last Term, this Court reaffirmed the importance of our federalist system of dual sovereignty, limiting Congress's legislative power over purely local matters. *See United States v. Lopez*, 115 S. Ct. 1624 (1995). This Court should now take the opportunity to reaffirm that, under *Erie*,

similar limitations are imposed on the federal judiciary. *See Erie*, 304 U.S. at 78-79.

Accordingly, the Court should grant certiorari on this issue, to reject the type of *ad hoc* predictions of state law that have been sanctioned by the Sixth, Second and Ninth Circuits and to make clear its direction to federal courts that the decisions of lower state courts are presumptively correct, and should be disregarded only when there is "persuasive evidence" that they do not accurately reflect the way in which the state's highest court would decide the question. This Court should also reaffirm that any prediction as to state law – particularly one based on rulings from courts outside the state – must be formulated in the light of, and explicitly evaluated against, that state's relevant jurisprudential principles, whether expressed by lower-court decisions on the issue, other decisions applying that state's law to the issue, or by decisions of the state's highest court on analogous questions on the same subject matter.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE BABCOCK & WILCOX COMPANY, *Plaintiff-Appellant/ Cross-Appellee,* *v.* ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO.; ST. PAUL MERCURY INSURANCE CO.; AMERICAN HOME ASSURANCE CO.; AMERICAN INTERNATIONAL MARINE AGENCY; ALLIANZ INSURANCE CO.; INSURANCE CO. OF NORTH AMERICA; CARYL VAUGHN GIBBS, individually and on behalf of certain underwriters of Lloyds of London; INDEMNITY MARINE ASSURANCE CO., LTD.; ENGLISH AND AMERICAN INSURANCE CO., LTD.; INSURANCE CO. OF NORTH AMERICA (UK), LTD.; C.A. PARR, *Defendants-Appellees/ Cross-Appellants,* CREOLE INSURANCE CO., LTD., *Defendant-Appellant/ Cross-Appellee,* MCDERMOTT, INC., *Third-Party Defendant-Appellant/Cross-Appellee.*	) ON APPEAL) from the) United States) District) Court for the) Northern) District of) Ohio

Decided and Filed May 17, 1995

Before: KENNEDY and NORRIS, Circuit Judges; TAYLOR, District Judge.*

KENNEDY, Circuit Judge. Defendants, a group of insurance companies, subscribed to an insurance policy designed to provide excess liability insurance to plaintiff. Plaintiff filed this declaratory judgment action against defendants, seeking a judgment that its lower levels of insurance had been exhausted and that defendants were now liable under the excess insurance policy. The parties filed cross-motions for summary judgment, and the District Court granted summary judgment in favor of defendants. Plaintiff now appeals, and we affirm. Defendants have also filed a cross-appeal, but we find it unnecessary to reach that issue.

I.

The Babcock & Wilcox Company ("Babcock") has manufactured boilers since the nineteenth century. Until 1972, Babcock approved the use of asbestos insulation, as well as various components containing asbestos, in its boilers. In 1972, Babcock ceased approving the use of asbestos insulation, although the use of certain asbestos-containing components continued until the mid 1980's.

* The Honorable Anna Diggs Taylor, United States District Judge for the Eastern District of Michigan, sitting by designation.

In 1978, J. Ray McDermott & Company ("McDermott") acquired Babcock. Beginning in 1979, McDermott and Babcock jointly purchased excess umbrella liability insurance coverage. McDermott, with the help of its longtime broker Adams & Porter, drafted an insurance policy to satisfy McDermott's needs. After the two parties finalized the language and contents of the policy, Adams & Porter lined up several insurance companies to "subscribe" to the policy. These insurance companies (collectively, the "Subscribers") are defendants in the present action.

The relevant portions of the policy provide as follows:

> 1. *COVERAGE*
>
> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State, and Municipal or other qualified authority or in respect of liabilities assumed by the Assured under contract or agreement, for "property damage" and "personal injuries" as defined herein resulting from an "occurrence" as defined herein.
>
> . . . .
>
> *DEFINITIONS*
>
> . . . .
>
> 4. *OCCURRENCE*
>
> The term "Occurrence," whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking

> place during the term of this contract in respect to all the Assured's operations.

The dispute in the District Court centered around the definition of an "occurrence". This definition is the center of controversy due to the "buffer layer" established in the policy. All parties acknowledge that the Subscribers' policy does not come into play until the damages for each occurrence exceed a specified minimum amount.[1] The dispute, therefore, centers around how many "occurrences" have arisen under the 1979-80 policy.

The policy defines "occurrence", in part, as a "happening" that arises out of an "event." Babcock's primary argument before the District Court was that the relevant "event" is Babcock's decision to use asbestos in its boilers, and the "happening" or "series of happenings" are the injuries suffered by people exposed to the boilers. While the Subscribers do not take issue with Babcock's definition of "happening," they do strenuously argue that the "event" is not the decision to use asbestos-containing components, but rather is each person's exposure to the asbestos components.

The District Court did not resolve the "number of occurrences" issue. Instead, the lower court assumed that Babcock's definition of "event" was correct and focused

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[1] At some points, the parties state that this specified amount is $2 million, while at other times they indicate that the amount is $2.5 million. We need not resolve this dispute. If we find in favor of Babcock, the record clearly indicates they have paid more than $2.5 million. If we find in favor of Subscribers, the record contains no evidence suggesting that the damages for any one "occurrence" (as the Subscribers define it) have amounted to $2 million.

on the last clause of the policy's definition of an "occurrence." That last clause states "arising out of or due to one event taking place during the term of this contract. . . . " After reviewing the record, the District Court concluded that Babcock had not carried its burden of showing that it made any pertinent decision during the term of the policy. Accordingly, the District Court granted summary judgment in favor of the Subscribers. Babcock now appeals.

II.

A. Trigger of Coverage

Babcock strenuously argues that the District Court erred in deciding the trigger of coverage issue, as it was not raised below and was not fully briefed. We disagree. We have reviewed the material submitted to the District Court in relation to the cross-motions for summary judgment, and the Subscribers clearly made this argument to the District Court. The argument was foreshadowed in early pleadings, and it explicitly appeared in the pleading entitled "Defendant Subscribers' Reply Memorandum in Opposition to Summary Judgment Motions of Babcock & Wilcox and McDermott." This pleading was filed with the District Court on March 5, 1993. A review of the lower court's docket sheet shows that Babcock filed at least one other relevant pleading after that date. On March 12, 1993, Babcock filed its "Reply by Plaintiff Babcock & Wilcox Co. in Opposition to Defendants' Cross Motion for Summary Judgment on Occurrence Issue and in Further Support of Plaintiffs' Partial Summary Judgment Motion." Thus, the Subscribers clearly placed the trigger of coverage issue before the District Court, and Babcock

had at least one opportunity to respond to that argument. Accordingly, the District Court did not err in resting its decision on that ground.

Turning to a review of the merits of this issue, we start our examination, as did the District Court, with the assumption that Babcock's definition of "event" is correct – that Babcock's decision to use asbestos in its boilers is the relevant cause of the injuries. Babcock argues that this assumption should essentially end our inquiry, as the Subscribers have conceded that injuries did occur during the policy year. Babcock's argument misses two key points. First, it totally ignores the dispute over what must occur during the policy term – the injuries or the event. Second, it lifts the Subscribers' alleged "concession" completely out of context. As we noted above, both parties agree on the definition of "happening" – the dispute is over the definition of "event." The Subscribers' "concession" was made in conjunction with their contention that the relevant "event" was the exposure to asbestos.

We turn then to what must occur during the policy terms under Babcock's definition of event. The relevant portion of the policy states: "The term 'Occurrence' whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking place during the term of this contract in respect to all the Assured's operations." The dispute revolves around the phrase "taking place during the term of this contract" and whether the phrase modifies "happening" or "event." Babcock argues that the policy requires the "happening or series of happenings" to occur during the policy term, as opposed to the "event."

The District Court correctly rejected this interpretation, and we adopt that portion of his opinion:

> Such an interpretation requires the court to ignore the plain import of the sentence; it would have this court apply a phrase at the end of the sentence to a phrase at the beginning of the sentence without regard to any of the material which lies between. Given the fact that the temporal restriction follows the term 'event' and is contained in an independent phrase separated from the description of happening by a comma, the plain meaning of the sentence is that the *event*, not the happening, must occur during the term of the contract.
>
> During the oral argument on the motions, plaintiff argued that "there appears to be a comma missing". . . . With regard to the missing comma theory, the court must confine itself to the content of the document. This court can no more decide this case based on phantom punctuation than it could decide this case based on words and phrases not incorporated in the contract.

At various points in this appeal, Babcock has argued that the terms of the policy are ambiguous, and, therefore, this court should construe the language against the Subscribers. The Subscribers rebut this argument by pointing out that Babcock and its insurance broker selected the terms of the policy. We need not resolve this dispute. In Ohio, as in most states, a court reviewing an insurance policy must give all the words and phrases in the contract " 'their natural and commonly accepted meaning.' " *Tomlinson v. Skolnik*, 540 N.E.2d 716, 718 (Ohio 1989) (quoting *Golmolka v. State Auto. Mut. Ins. Co.*,

436 N.E.2d 1347, 1348 (Ohio 1982). The doctrine of construing the language against the insurance company does not come into play unless a clause is ambiguous. *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1384 (Ohio 1988). As the District Court correctly concluded, the clause at issue in this case is not ambiguous. Once the "phantom comma" argument is rejected, the policy clearly requires that the "event" must take place during the policy term. That is the only reasonable reading of the clause.

After concluding that the relevant "event" must occur during the policy term, the District Court held that Babcock had not made the decision to use asbestos during that term. Anticipating that we might uphold the District Court on the first issue, Babcock contends that the District Court also erred with respect to the latter conclusion. This brings us back to the definition of "event." For purposes of this issue, we are assuming that the relevant event is Babcock's decision to use asbestos in its boilers. Accordingly, we now turn to the issue of whether a "decision" occurred during the term of the policy.

The most obvious use of "decision" would be to describe an explicit decision by Babcock's executive officers or board of directors to continue using asbestos in the boilers. Babcock, however, has presented no evidence to show that it formally reconsidered its stance on asbestos during the term of the policy and decided to continue using it. Instead, Babcock has offered a number of theories as to what might constitute the relevant decision. The first is a "continuing decision" theory; that is, every time Babcock made or offered to make a boiler with

the asbestos components, it remade the "decision". Babcock has also proffered a "continuing exposure" theory; that is, during the policy year, thousands of Babcock boilers containing asbestos were out in the marketplace. Babcock's decision to manufacture these boilers put workers in a situation where, during the policy year, they were exposed to asbestos. We agree with the District Court that these theories are not sufficient to establish that a decision took place during the policy term. In addition to being strained interpretations of a "decision," both of these arguments move away from Babcock's "one occurrence" scenario and start to sound remarkably like the Subscribers' "multiple occurrence" theory – each manufacture of a boiler or each exposure of a worker are separate "events" under the policy.

Finally, Babcock contends that even if they have not shown as a matter of law that a decision was made during the policy year, they have introduced sufficient evidence to create a triable issue of fact. We find no merit to this contention.

B. Number of Occurrences

Although the District Court did not decide the number of occurrences issue, it was fully briefed below. We apply *de novo* review to a grant of summary judgment and may affirm a grant of summary judgment on grounds other than those used by the lower court. *See, e.g., Baggs v. Eagle-Picher Indus. Inc.*, 957 F.2d 268, 273 (6th Cir.), *cert. denied*, 113 S. Ct. 466 (1992). Consequently we have chosen to address the "number of occurrences" issue.

To reiterate, the policy defines "occurrence" as "any happening or series of happenings, arising out of or due to one event taking place during the term of this contract. . . . " The parties essentially agree that, in the present context, the "happening or series of happenings" mentioned in the policy refers to the actual injury or disease suffered by a person exposed to the asbestos in Babcock's boilers. The parties, however, differ drastically in their definition of "event." According to Babcock, the "event" is Babcock's decision to use asbestos in its boilers. According to the Subscribers, the relevant "event" is each worker's exposure to the asbestos in the boilers. Thus, Babcock's definition of "event" would result in a finding of one occurrence. The Subscribers' definition, however, would result in many occurrences under the policy. Disputes over insurance policies are fundamentally contract disputes. As we discussed above, Ohio law requires that we look first to the language of the contract in trying to resolve the parties' dispute. We can go behind the face of the policy only if we determine that the controverted language is unclear or ambiguous.

The parties have directed our attention to a number of cases to assist us in construing the relevant language. Many of the cases cited by Babcock would superficially appear to support their position that only one occurrence exists. A closer look, however, reveals that the resolution of these cases turned on a definition of "occurrence" different from the one in the policy at issue. Of the cases cited by the parties, only three interpret definitions that are significantly similar to the one at bar. These are *Norfolk & Western Ry. Co. v. Accident & Casualty Ins. Co.*, 796 F. Supp. 929 (W.D. Va. 1992), *aff'd. in part and dismissed*

in part as moot, 41 F.3d 928 (4th Cir. 1994); *Pittsburgh Corning Corp. v. Travelers Indemnity Co.*, No. 84-3985, 1988 WL 5302 (E.D. Penn. Jan. 21, 1988); and *Northern Shipping Co. v. Arkwright Boston Mfg. Mut. Ins. Co.*, 617 F. Supp. 136 (E.D. Penn.), *aff'd.*, 774 F.2d 1152 (3d Cir. 1985).

Only one of these cases, *Pittsburgh Corning*, involved asbestos. Pittsburgh Corning manufactured a product known as Unibestos. The insurance policy defined "occurrence" as "one happening or a series of happenings arising out of or resulting from one event taking place during the term of this policy." Travelers argued that the cause of all injuries was Pittsburgh Corning's manufacture and sale of asbestos. The court rejected that argument, stating

> Pittsburgh Corning is being sued by thousands of claimants alleging exposure to Unibestos on hundreds of job sites, on thousands of different dates, and under a variety of conditions over a period of six years. Not everyone exposed to asbestos is affected and not all claimants were exposed under the same circumstances or to the same lot of asbestos. I hold that the 'cause' of the injuries in question is the exposure of each individual to asbestos. That exposure thus constitutes an occurrence for the purposes of determining the number of occurrences.

1988 WL 5302 at *2.

In *Norfolk & Western Railway*, the railroad brought an action against its excess insurer seeking to force the insurer to pay for claims arising out of noise-induced hearing loss. Again, the policy's definition of an "occurrence" is substantially the same as the definition in the

policy at issue in this case. The railroad attempted to argue that only one "event" existed under the policy – the railroad's failure to protect its employees from excessive noise. The court rejected this argument, declaring:

> The difficulty that the court has with this argument is that it leads to a result which would defy common sense. The typical single occurrence giving rise to multiple claims is the automobile accident which gives rise to a chain of events which results in injury to several parties. . . . In this case, a wide variety of machines in a number of different locations created a variety of sounds over the course of a number of years. Railroad employees working near these machines suffered injury to their hearing as a result of exposure to these sounds. . . . While the railroad's negligence may indeed have been a cause of the injuries, calling that negligence the single occurrence out of which the claims arose is nonsensical.
>
> The railroad's argument allows the cause test to sweep too broadly and arrives at a result which defies common sense. . . .

796 F. Supp. at 937. The court in *Northern Shipping* reached a similar conclusion, holding that the immediate cause of the injury was the relevant "event" for purposes of the policy, rather than a more remote cause. 617 F. Supp. at 138-39.

We find the reasoning of these three courts persuasive and agree with their result. Consequently, we reject Babcock's definition of "event." As Babcock relies exclusively on its proffered definition to support its theory for

recovery, the District Court correctly granted summary judgment in favor of the Subscribers.[2]

C. Failure to Warn

Creole Insurance Company, which provides an intermediate layer of excess insurance, was joined as an indispensable party to this action. After the District Court granted summary judgment in favor of the Subscribers, Creole filed a motion to alter or amend the judgment. In that motion, Creole argued that a relevant "event" had indeed occurred during the policy term, and that the event was Babcock's failure to warn its customers about the dangers of asbestos. The District Court denied Creole's motion, and Creole now appeals.

We need not address either the procedural posture or the merits of Creole's motion. Even if Creole is right, that only affects our holding on the "trigger of coverage" issue. It leaves undisturbed our primary holding that the relevant "event" is exposure to asbestos, not a more remote cause such as Babcock's decision to use asbestos or its failure to warn. Consequently, Creole's argument would not change the outcome of this suit, and we therefore decline to address it.

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[2] Babcock also argues that the District Court's conclusion leads to an absurd result because it creates a gap in coverage between the primary and excess layers of insurance. That result, however, is the logical one based on the language of the policy. The District Court did not "create" a gap. Rather, it simply recognized that the parties had drafted contract language that led to such a gap.

D. Choice of Law

In the event we reversed the District Court, the Subscribers cross-appealed the District Court's choice of law decision. As we have affirmed the lower court, we need not reach this issue.

III.

For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX CO., Plaintiff, - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO., et al. Defendants.	CASE NO. 5:91CV0987 Judge Sam H. Bell ORDER (Filed Aug. 19, 1993)

As this court has previously stated, it has before it a plethora of motions to dispose of this cause in one manner or another. It is neither necessary nor beneficial to discuss any of these in this order because they address issues analytically distant from the primary question to be resolved. In reaching the conclusions stated below, the court relied on voluminous evidentiary supplements and detailed briefs, and, as well, the well-organized and articulate presentations of counsel made during hearings on the first set of motions. The cross motions for summary judgment on the occurrence issue are, however, immediately relevant.

All parties appear to agree that this matter is properly resolvable at this stage. Counsel for plaintiff explicitly advised the court to "rule based on the policy itself." (Hearing Transcript at 87.) Likewise, counsel for the defendants, summarizing the posture of the case, explained: "[T]here appears to be unanimous consent

there are no material fact disputes. The parties' disagreements in this case . . . boil down to the legal standard by which the policies should be interpreted, the manner in which it should be interpreted." (T. at 33.)

BACKGROUND

I. Adams & Porter Policy Number 8658.

Defendants in this action are subscribers to a policy of quota share excess umbrella insurance written by Adams & Porter (hereinafter, "the Policy"). The Policy generally provides excess liability insurance for J. Ray McDermott & Co., Inc. and its subsidiaries and affiliates. McDermott is the owner of plaintiff Babcock & Wilcox Company. The Policy which is the subject of this suit was effective between April 1, 1979 and April 1, 1980 ("the Policy term").

According to the terms of the Policy, the Underwriters agreed:

> to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State, and Municipal or other qualified authority or in respect of such liabilities assumed by the Assured under contract or agreement, for "property damage" and "personal injuries" as defined herein resulting from an "occurrence" as defined herein.

A limit of liability provision renders the Underwriters liable only when the claims arising from a single occurrence exceed $2.5 million. This limit functions in many respects in the manner of a deductible feature. The

Underwriters are not liable for more than $20 million for claims arising from a single occurrence.

The term "personal injury" is broadly defined to mean "bodily injury (including death at any time resulting therefrom), . . . sickness, [or] disease."

The critical term on which the parties focus is "occurrence" defined by the Policy as follows:

> The term 'occurrence', whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking place during the term of this contract in respect to all the Assured's operations."

II. Babcock & Wilcox' History.

Plaintiff has been in the business of manufacturing and servicing boilers since the mid-1800s.[1] An 1884 contract contains the first reference to asbestos use by plaintiff. By 1895, contracts provide evidence that plaintiff was specifying the use of asbestos-containing gaskets. (Dilling depo. at 23.) According to plaintiff, the word 'specification' as used here, means that customers were informed that if they selected asbestos as a product material, B&W would agree to and approve the use of asbestos. While at an earlier time asbestos was commonly used as an insulating material in boiler assemblies, the choice dictating the use of that material was first and foremost the choice

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[1] Plaintiff produced Marcia J. Dilling for purposes of testifying on plaintiff's historic use of asbestos. Ms. Dilling is a product technical representative for plaintiff and reviewed numerous contracts and other documents in preparation for her deposition.

of the client. But there is no question that B&W did, in fact, furnish asbestos-protected boiler units conjunctive with the role of installer of its boiler units. (Dilling at 26-30.)

After a boiler product is designed, utilizing standard documents which contain plaintiff's specifications, the boiler is fabricated. Fabrication may be done by plaintiff's employees, an outside contractor, or a combination of both. The fabricated components are then sent to the boiler site, be that a building, factory, power plant, or shipyard, and there installed. The insulation is usually installed at the boiler site as well. The installation may be executed by plaintiff or by third parties who receive the plaintiff's specifications and the fabricated components. (Dilling at 43-44.)

In 1972, according to plaintiff's witness, plaintiff stopped recommending the use of asbestos as an insulator. (Dilling at 38.) This decision is apparently reflected in what the witness refers to as "standard documents." (Dilling at 38.) These documents "specify what B&W approves." (Dilling at 46.) Customers could still seek to substitute a different component if they so chose. For example, while plaintiff stopped generally specifying asbestos-containing gaskets in 1983, one division continued to specify such gaskets until 1987. Indeed, that particular division continued to utilize asbestos-containing gaskets as a replacement part until 1992 for one customer who continued to request them. (Dilling at 56.) Plaintiff stopped specifying asbestos braid in the early 1980s. (Dilling at 58.)

The decision to curtail specification of asbestos as an insulator and as asbestos-containing cement appears to have been motivated by two forces. First, in 1970, asbestos was put on a toxic substance list. Second, an increasing number of plaintiff's clients requested a replacement for asbestos. Thus, concern about toxicity and response to market preferences (which may themselves have been dictated by concern about toxicity) led to the change in specification in the early 70s. (Dilling at 61.)

III. The 1979-1980 Asbestos Claims.

The parties have entered into a number of stipulations which effectively define the nature of the claims for which plaintiff now seeks indemnification from the subscribers to the Policy. First, the asbestos-related bodily injury claims submitted "arise from liabilities imposed upon B&W by various federal, state, and/or municipal courts, and/or under settlement agreements entered into by B&W." (Docket # 246 at 9.) Second, the asbestos-related claims submitted under the Policy are personal injury claims as defined in the Policy.

Third, the claims are described as "claims for personal injuries, which are alleged to have occurred in part or in whole, during the Policy period of April 1, 1979 to April 1, 1980 (the 'Policy Period')." *Id.* at 9-10.[2] From

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[2] The term "occurrence" has a highly specific meaning within the context of this cause. The parties have not argued that "occurred" is used in the stipulation as a term uniquely defined by the Policy. Rather, it appears that "occurred" is utilized in the stipulation in its generic, everyday sense.

Plaintiff's briefing, it appears that the claims were made by third parties who, during the Policy Period, were exposed to asbestos-containing products manufactured by plaintiff. None of the individual asbestos-related bodily injury claims filed against B&W exceed $2.5 million. The aggregate total of the asbestos-related bodily-injury claims based on exposure to asbestos-containing boilers during the Policy Period does exceed $2.5 million.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, a court must consider the pleadings, related documents, evidence, and all reasonable inferences in a manner most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 86 L.Ed.2d 142 (1970); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). Rule 56 provides, in relevant part, as follows:

> (c) . . .
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> . . .
>
> (e) . . .
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by

> affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Three Supreme Court cases have provided guidance as to the nature of the respective burdens allocated under Rule 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The ultimate burden lies with the non-moving party to show the existence of a genuine issue of material fact. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Fed. Rule Civ. Proc. 56(e)." *Matsushita*, 475 U.S. at 586-587 (emphasis supplied). "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The court in *Anderson* held that "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

On the other hand, the moving party's burden under Rule 56 is lighter.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c) . . . suggests the absence of such a requirement.

Celotex, supra, at 323 (emphasis supplied).

The Sixth Circuit Court of Appeals, in *Street v. J. C. Bradford and Co.*, 886 F.2d 1472 (6th Cir. 1989) recently reviewed court decisions and commentary regarding the impact of *Anderson, Celotex,* and *Matsushita* on summary judgment practice. The court concluded that a "new era" in summary judgment practice has opened in the court system as a result of these opinions.

> Scholars and courts are in agreement that a "new era" in summary judgments dawned by virtue of the Court's opinions in these cases . . . On the whole, these decisions reflect a salutary return to the original purpose of summary judgments. Over the years, decisions requiring denial of summary judgment if there was even a suggestion of an issue of fact and

> tended to emasculate summary judgment as an effective procedural device.

Street, supra, at 1476.

The court enunciated the following "new era" principles, among others: as on federal directed verdict motions, the "scintilla" rule applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion; the respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment"; the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. *Id.* at 1479-1480 (footnotes and citations omitted).

LAW AND ANALYSIS

This cause is governed by Ohio law. Under Ohio law, an insurance policy is a contract governed by general rules of contract law. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 665 (1992), *cert. denied* 113 S. Ct. 1585 (1993). The cardinal rule of construction is that if an insurance contract is clear and unambiguous, the contract must be interpreted in accordance with its plain meaning. *Hybud Equip.*, 64 Ohio St. 3d at 665. This long-followed rule is designed to prevent a court from rewriting an insurance policy otherwise susceptible to only one reasonable interpretation. *National Life Ins. Co. v. Ray*, 117 Ohio St. 13, 22 (1927) ("Insurance policies, like other written contracts, mean what they say and all they say. They are written for the protection of both parties

thereto, and all others interested in the policies. If such policies are not to be enforced as written, they might as well not be written at all.") The intention of the parties must be derived from the whole contract, not by focussing [sic] on any one part. *Tomlinson v. Skolnick*, 44 Ohio St. 3d 11, 13 (1989).

I. Plaintiff's Construction and Application of the Policy.

In the instant cause, plaintiff claims that the third-party asbestos-related personal injuries collectively constitute one series of happenings arising out of one event and therefore, collectively constitute one occurrence. Such a construction of the Policy could trigger coverage under the Policy because, while no single asbestos-related injury claim against plaintiff exceeds $2.5 million, the aggregate of asbestos-related injury claims does far exceed the "deductible."[3]

Plaintiff reaches its interpretation by applying certain meanings to the terms which define "occurrence". First, plaintiff claims that "happening or series of happenings" is synonymous with the harm for which plaintiff is indemnified – personal and bodily injures. Second, plaintiff claims that "event" means the tortious act which ultimately caused the personal injury. Third, plaintiff claims that the phrase "series of happenings" specifically indicates that multiple injuries sharing a common cause should be aggregated as a single occurrence. Finally,

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[3] Defendant subscribers have also moved for summary judgment based on a series of affirmative defenses. It is unnecessary to analyze the merits of those motions.

plaintiff asserts that only the personal injury must occur during the Policy term.

Applied to this case, plaintiff argues that the asbestos-related diseases for which claimants filed actions against plaintiff are a series of happenings. Plaintiff defines the one event out of which these injuries arose as plaintiff's decision to specify asbestos-continuing components in the design, fabrication, assembly and servicing of boilers. Plaintiff claims that because part of the injury to the claimants occurred during the Policy term, the claims satisfy the temporal requirements of the Policy.

After noting that a chief source in interpreting policy language is case law, plaintiff offers a variety of cases to support its interpretation and application of the Policy. According to plaintiff, this court should follow the instruction that "the Court's inquiry is whether there was one proximate, uninterrupted and continuing cause which resulted in all the injuries and damages." *Owens-Illinois, Inc. v. Aetna Casualty and Sur. Co.*, 597 F. Supp. 1515, 1527 (D.D.C.) (applying Ohio law). Plaintiff cites an Ohio opinion which concluded: "[A manufacturer's] decision to manufacture and distribute asbestos-containing brake components constitutes the single-occurrence out of which the 'asbestos claims' arose." *Morton Thiokol, Inc. v. Aetna Casualty and Sur. Co.*, No. A-8603799, slip op. (Hamilton Cty. C.P. Dec. 28, 1988). Finally, plaintiff cites a variety of opinions and annotations which demonstrate that other courts have held that a single occurrence arises from the continuing manufacture and sale of asbestos-containing products. *See e.g., Air Prods. & Chem. v. Hartford Accident and Indem. Co.*, 707 F. Supp. 762, 777 (E.D. Pa. 1988).

Defendants concur in interpreting the happening as the injury or damage for which coverage is sought. Defendants interpret the event to be the accident or fortuitous incident that gives rise to or causes the injury or damage. Defendant also argues that the 'event' must take place during the Policy period. This interpretation, in conjunction with certain contentions arising from the facts, lead defendants to a different conclusion.

First, defendants contend that the use of asbestos by plaintiff can not be characterized as an event taking place during the Policy period. Second, defendants contend that even if the use of asbestos is an event within the Policy period, it would not be an *insurable* event since the injuries were not fortuitous – by 1979, plaintiff knew of the harms from asbestos-exposure. In light of these contentions, defendants believe that the only plausible interpretation of the Policy is that the event is the *exposure of an individual to asbestos* and that the happening is the injury sustained by the individual due to the exposure.

II. Interpretation of 'Occurrence' Definition.

As presented, plaintiff's interpretation of the definition of 'occurrence' is problematic. Such an interpretation is predicated on a strained reading of the temporal restriction in the Policy. Plaintiff claims that the definition of 'occurrence' does not require that the event which is the cause of the personal injury occur during the Policy term and further claims that the Policy requires that the happening, that is the injury, occur during the Policy

term. It is believed that such an interpretation is inconsistent with the plain meaning of the definition and is also inconsistent with apparently accepted practice in the insurance industry.

Broken into its components, the definition of occurrence has four relevant parts: "[1] any happening or series of happenings, [2] arising out of or due to [3] one event [4] taking place during the term of this contract." Plaintiff's analysis focusses primarily upon the first and third portions of the definition.

Such an interpretation requires the court to ignore the plain import of the sentence; it would have this court apply a phrase at the end of the sentence to a phrase at the beginning of the sentence without regard to any of the material which lies between. Given the fact that the temporal restriction follows the term 'event' and is contained in an independent phrase separated from the description of happening by a comma, the plain meaning of the sentence is that the *event*, not the happening, must occur during the term of the contract.

During the oral argument on the motions, plaintiff argued that "there appears to be a comma missing" and that "[t]his definition was written by the insurance industry and they could have drafted a clearer definition." (T. at 9-10.) With regard to the missing comma theory, the court must confine itself to the content of the document. This court can no more decide this case based on phantom punctuation than it could decide this case based on words and phrases not incorporated in the contract.

As for the clarity of this provision, it should be noted that plaintiff initially argued that the provision is clearly

and unambiguously in its favor. (Docket #267 at 13 ("[T]he Subscriber policy is not ambiguous.")) But the same party also argues that if the passage is not interpreted in its favor, the passage must be ambiguous and unclear. (T. at 9.) As a substantive matter, the court is of the opinion that the provision is clear and unambiguous. Plaintiff's own arguments reinforce this conclusion.

Beyond the plain grammar, plaintiff strenuously argues that the Policy is what is called an occurrence policy, as distinguished from a claims-made policy or an accident policy. (Hearing Trans. at 8.) This construction of the Policy is consistent with the interpretation by another court in regard to a policy with a substantially similar occurrence definition. *Pacific Resources, Inc. v. American Bureau of Shipping*, 1984 WL 928 (S.D.N.Y. 1984). The *Pacific Resources* court explained the difference between an occurrence policy and a claims-made policy:

> The Bumbershoot policy is an 'occurrence' as opposed to a 'claims made' policy; it protects the policy holder from liability for any act done while the policy is in effect, whereas a 'claims made' policy protects the holder against claims made during the life of the policy. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 n.3 (1978). Thus, a shipowner/operator who operated for only one year, say in 1975, would only need one 1975 'occurrence' policy, but would require several years of 'claims made' policies to protect itself from claims arising out of acts in 1975. *See St. Paul Fire*, 555 F.2d 3, 5 n.1 (1st Cir. 1977).

Pacific Shipping at 4. *See also Kaiser v. Wood*, 1992 WL 2538 *3 (Ohio App. 1992) (distinguishing claims made policy);

Chicago Insur. Co. v. Mills, 1989 WL 50668 *2 (Ohio App. 1989) (noting that an occurrence policy is "one which covers only acts which occurred during the policy's term."); *Mitchell v. Continental Casualty Co.*, 1981 WL 2945 *3 (Ohio App. 1981) ("in an 'occurrence' policy the coverage is effective if the negligent or omitted act occurred during the period of the policy, whatever the date of discovery.")

Under plaintiff's interpretation, the Policy only protects the assured in the event an injury occurs during the policy year. However, if, for example, an assured manufactured a defective boiler in 1979 and it did not explode until 1982, because the injury did not occur during the term of the contract, the injury would not be insured. In effect, under this interpretation, an assured is required to secure a series of policies to adequately indemnify itself. Such a practice is directly inconsistent with the usual interpretation and intent of an occurrence policy.

On the other hand, by interpreting the contract to require that the event, that is the causative act, occur during the term of the contract, the policy is consistent with the usual meaning and import of an occurrence policy. In sum, plaintiff's interpretation is both contrary to plain meaning and, on its face, not reasonable considering the policy as a whole. To prevail, plaintiff must show that the claims for which it seeks payment from the Subscribers are for injuries which arose from a common event which took place during the Policy term.

Through the extensive course of briefing, defendants articulated a variety of arguments in opposition to plaintiff's claim. Eventually, defendants' argument evolved to

the position that, first, the court must rule that the common event had to occur during the Policy period. Second, defendants argued, even if this court accepts the general meaning of the other terms propounded by plaintiff, the instant cause must be dismissed because plaintiff can not show that the claims arose from a common event which arose during the Policy term. This argument has the attractive quality of simplicity. Rather than analyze the depth of defendants' substantive objections to plaintiff's general interpretation of the Policy, this court, having accepted defendants' specific objection to plaintiff's interpretation of the temporal requirement, shall focus its analysis on the question of the common event. If no common event occurred during the Policy period, plaintiff's claim must necessarily fail.

III. Decisional Continuum as Causative "Event".

Plaintiff argues that all asbestos-related bodily injury claims were necessarily caused by the decision to specify and use asbestos in manufacturing and repairing boilers and boiler components.[4] Accordingly, the court is asked to accept that asbestos-related personal injuries arise from or are due to that decision. In effect, the decision is the "event". However, no evidence linking the injuries to

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[4] [T]he event is the continuing decision to use or permit the use of asbestos in the boilers; the happenings or the series of happenings are the injuries.

But even if you do find that the event has to occur in the policy year, in this case the event is a continuing decision and it also occurred during the policy year.

(Tr. at 10.)

a decision made during the Policy term was presented. Rather, the injuries are linked to the decision to use and specify asbestos in general, not to any decision to use or specify the use of asbestos specifically made during the Policy term.

Plaintiff has argued that the Policy is an occurrence policy. The court concurs. As an occurrence policy, it is irrelevant when an injury occurs. To the contrary, an occurrence policy is explicitly designed to insure *whenever* an injury occurred. Otherwise, as previously noted, the assured would have to secure a series of policies into an indefinite future to secure adequate insurance.

Applying this theory to a more conventional product liability context, if an assured decided to use a defective valve in a boiler in 1940 and continued to specify that valve in boilers until 1980, the insurer for 1975 would be liable for an explosion in 1975 of a 1945 boiler even though the decisions relating to the exploded boiler were made thirty-five years before the policy was written. On the other hand, once the assured ceases to specify the defective valve, no insurer is liable for subsequent explosions of the defective boilers. Thus, it can be seen that this theory works the opposite of an occurrence policy. In an occurrence policy, no matter when an injury occurs, the claim is referred back to the policy in force at the time the injury was caused. Under plaintiff's theory, an injury is referred forward to the policy in effect when the injury occurs regardless of when the injury was caused. As previously noted, plaintiff's counsel argued that the Policy is an occurrence policy, not some kind of hybrid "injury-occurred" policy. This court concurs with that construction.

Under the terms of the Policy, when an injury is inflicted is irrelevant to the occurrence definition. The timing of the cause of the injury is relevant. The court must reject plaintiff's argument that an individual injured by asbestos during the Policy term because of a decision to specify asbestos before the Policy term has an injury arising from an event during the Policy term. Plaintiff must demonstrate that the injuries were caused by an event in 1979-1980. To hold otherwise would substantially rewrite a critical passage of the contract.

A number of opinions were cited in the briefs and at the hearing. Of these, only two definitely deal with how Ohio courts would interpret the contested provisions. The remaining cases are cited to support less controversial issues.

Owens-Illinois is attacked by defendants because it has come under sharp criticism in subsequent opinions. *See Norfolk & Western Rwy. Co. v. Accident & Cas. Ins. Co.*, 796 F. Supp. 929 (W.D. Va. 1992), *appeal pending*. It is not necessary to resolve the continued vitality of *Owens-Illinois* because the case addresses a fundamentally different legal issue from that posed herein.

The definition of "occurrence" interpreted in *Owens-Illinois* provided:

> "occurrence" means an accident, including injurious exposure to conditions, *which results, while this policy is in force,* in personal injury, property damage or advertising offense which is neither expected nor intended from the standpoint of the insured.

Owens-Illinois, 597 F. Supp. at 1529 (emphasis added). In contrast to the Policy here, the *Owens-Illinois* policy is triggered by a result, that is an injury, occurring during the policy term. It is irrelevant when the injury was caused under the *Owens-Illinois* policy. Whether or not the D.C. District correctly applied Ohio law in *Owens-Illinois* is largely irrelevant since, even if its interpretation were appropriate in that case, it is not appropriate in the instant case which involves a policy with a substantially different definition.

Morton Thiokol v. Aetna is also unhelpful. Morton Thiokol sought partial summary judgment against Aetna as to Asbestos Claims Premiums. The Court of Common Pleas, after listing the documents it read in conjunction with the motion, declared that there were no issues of material fact. Beyond that, the court merely held: "Morton Thiokol's corporate decision to manufacture and distribute asbestos-containing brake components constitutes the single occurrence out of which the 'asbestos claims' arose." *Morton Thiokol*, slip op. at 1. The record does not contain any reference to when the corporate decision was made or how corporate product design occurred.

An Ohio Court of Appeals reversed the court of Common Pleas in a related case involving this same policy. The Court of Appeals ruled that the trial court erred in applying Ohio law. *Motion Int'l, Inc. v. Aetna Cas. & Sur. Co.*, 1991 WL 201651, 6 (Ohio App. 1991). In that opinion, the appellate court noted that the policy defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.* at 3. The policy

language which forms the foundation for any interpretation was again substantially different from the Policy involved in the instant suit. Likewise, given the cryptic order of the trial court upon which plaintiff relies, it is impossible to determine whether the decision is based on an underlying factual predicate which is at all analogous to the instant cause.

An Ohio appellate court has applied a "continuous event" theory of causation to at least one case involving an occurrence policy of excess liability insurance. *See Phoenix Phase I Assoc. v. Ginsberg, Guren & Merritt*, 23 Ohio App. 3d 1 (1985). *Phoenix* involved malpractice by a law firm involved in a real estate deal. The court held that the liability should be apportioned between a 1972-73 and a 1973-74 insurance policy because, while the decision to endorse the deal occurred during the first policy, all investors were also harmed by the firm's equally negligent failure to explain certain remedies available to upset investors during the second policy. *Id.* at 3. The case is noteworthy because the Ohio court did not merely rely on the fact that the firm did not change its initial negligent decision but rather the court emphasized an independent negligent act which took place during the second policy period.

As a matter of law, it is apparent that given the specific language of the Policy and the general approach to this area of excess insurance, an Ohio court would require plaintiff to point to some act taking place during the Policy period as a contractual predicate to Subscriber liability.

CONCLUSION

In interpreting the Policy, this court is constrained by the terms to which the parties agreed. When those words have a single, plain meaning, this court must apply that meaning. The definition of occurrence contained in the Policy plainly requires that an occurrence is all injuries caused by an event which took place during the term of the contract. Even accepting, *arguendo*, any definition of a decision as the causative event, the evidence in this case does not relate the claims to any specific decision made during any identifiable period, let alone to a decision made during the Policy term. As such, the claims can not be said to implicate the liability of the Subscribers. Defendants' motion for summary judgment (docket #271) is hereby GRANTED.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX CO., Plaintiff, - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO., et al. Defendants.	CASE NO. 5:91CV0987 Judge Sam H. Bell ORDER (Filed Aug. 19, 1993)

This Court having filed its order of decision of the matters in this action, therefore, pursuant to Fed. R. Civ. P. 58, IT IS ORDERED that this action is hereby terminated.

Further, the court instructs the parties to make provision with the Clerk's Office to effect prompt removal of the affidavits filed under seal with the Clerk.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX CO., Plaintiff, - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO., et al. Defendants.	CASE NO. 5:91CV0987 Judge Sam H. Bell ORDER (Filed April 9, 1993)

Pending before the court are a variety of motions and cross-motions for partial and complete summary judgment. These motions are accompanied by a voluminous factual record. It is immediately apparent that these motions and the accompanying exhibits raise substantial factual and legal questions. It is not, however, immediately clear that the factual questions are material questions of fact which should be reserved for a jury's consideration. To the contrary, at various points in the briefs of both sides, the parties argue that the instant cause is ripe for resolution based on the motions.

The current posture of this case presents a variety of legal, factual, and practical difficulties for the court. Now before the court is an array of motions for summary judgment, partial summary judgment cross-motions for summary and partial summary judgment and interlocking reply/responses. Accompanying this torrent of legal argument and authority is an ocean of evidence filed in the form of appendices. These latter volumes include extensive deposition excepts, sample contracts, actual

contracts, drafting history, correspondence, notes, unreported cases and even a decades old thesis on excess liability insurance. The record now contains approximately 1,500 pages of supplemental material which the court is expected to consider and comprehend.

Considering the entirety of this material is both time consuming and frustrating given the desireability [sic] of reaching a prompt resolution of this matter. But because of the literal mass of the material submitted, we have only now come to the point at which any oral presentation might be profitably made and understood.

The first motion before the court is third party defendant McDermott, Inc.'s motion for partial summary judgment filed on January 25, 1993. That motion seeks three things. First, "judgment that McDermott has satisfied all conditions and/or warranties regarding the maintenance of proper underlying insurance and the 'buffer layer' ". Docket #265 at 1. Second, McDermott urges, "that this Court declare that all third-party asbestos related bodily injury claims against B&W are the result of one occurrence." *Id.* Finally, McDermott urges that the defendant/third party plaintiff subscribers "are not entitled to rescind or reform the policy." *Id.* at 1-2. McDermott's supporting memorandum also seeks permission to supplement the memorandum with additional facts in the event the subscribers' motion to amend the pleadings is granted.

The second motion, also filed January 25, is Babcock & Wilcox's motion for partial summary judgment. Like McDermott, Babcock & Wilcox "requests that the Court enter judgment that third party asbestos-related bodily

injury claims are the result of one occurrence." Docket #267 at 1.

Defendant subscribers joined the paper fray with two motions of their own filed simultaneously with the preceding motions on January 25. The first motion is styled, "Defendant Subscriber's Motion for Summary Judgment of Dismissal or, Alternatively, for Summary Judgment on Their Third Party Complaint." This motion primarily rests on one argument: "The Court should rule that the claim of each asbestos bodily injury claimant is a separate 'occurrence' within the meaning of the Subscriber and Creole policies." Docket #271 at 23. This motion also advances the argument that, if the Subscribers are liable to Babcock & Wilcox, they deserve to be indemnified by McDermott for failing to satisfy all of the warranties and conditions of the Subscriber policy. In effect, this motion is a cross motion addressing substantially the same issues addressed in the previously noted motions of Babcock & Wilcox and McDermott.

The other motion by Subscribers seeks summary judgment on another alternative theory. It is styled, "Motion for Summary Judgment on Certain Defendants' Reformation, *Uberrimae Fidei* and Rescission Defenses." Docket #272 at 1. This motion asserts affirmative defenses upon which Subscribers base their claim for dismissal.

The second wave consists of Babcock & Wilcox's motion for summary judgment on the rescission and reformation issues as well as the applicability of the doctrine of *uberrimae fidei*. This motion was filed on March 5, and is obviously a cross motion opposing the second of

Subscribers' two motions. Plaintiff also filed a memorandum and exhibits opposing subscribers' first motion for summary judgment and supporting plaintiff's motion for partial summary judgment on the occurrence issue.

The sixth motion for summary judgment was also filed on March 5, by third-party defendant McDermott for dismissal of the third party complaint. This motion is also styled to serve as McDermott's opposition to subscribers' motion for summary judgment on the third party complaint.

In addition to the memoranda accompanying the actual motions, the parties have filed numerous other response and reply briefs including supplemental appendices and exhibits. The briefing has reached the surreply stage now where parties are filing briefs initially protesting that their opponent has filed an unpermitted brief and then seeking this court's leave to do the same.

The effect of this course of briefing is to bifurcate the legal issues raised by this cause. One set of cross-motions generally deals with defining a single occurrence under the policy. The second set generally deals with subscribers' affirmative defenses. Disentangling the corpus of motions and briefs beyond this rough division is not currently practicable.

Counsel for the defendants has suggested that this court's deliberations might be better guided if the parties are given an opportunity to argue the motions before the court. That suggestion is well taken. Therefore, this court now orders that the parties appear for a hearing on May 14, 1993, at 9 a.m. At that hearing, each side shall be

allotted 90 minutes in which to make a presentation and answer the inquiries of the court.

The motions present a number of discrete legal issues which have been, and may properly continue to be, treated independently. While the underlying facts are the same, the legal analysis required to resolve these issues is different. To best utilize the oral argument process, the May 14 hearing is to be dedicated only to consideration of the cross-motions for summary judgment regarding interpretation of the insurance policy, specifically, the meaning and interpretation of the operative provisions of the occurrence definition. Consideration of third-party issues involving McDermott Inc. and affirmative defenses such as reformation and rescission *will be deferred* to a future hearing which shall be scheduled as needed.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX COMPANY Plaintiff - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY, et al. Defendant	CASE NO. 91-CV-987 Judge Sam H. Bell ORDER (Filed Aug. 3, 1992)

Presently before the court in the above-captioned cause is a motion in limine by plaintiff, The Babcock & Wilcox Company (B&W), for a determination of which state law, in the absence of a choice of law by the parties, is to be applied in construing a disputed term of B&W's liability insurance contract with defendant insurers. Plaintiff contends that, under the "more significant relationship" analysis adopted by Ohio courts, Ohio law should be applied. Defendants have filed a brief in opposition in which they contend that, under the same analysis, Louisiana law should be applied.

BACKGROUND

The present action involves a dispute over liability insurance coverage for asbestos-related claims arising from B&W's design, manufacture, sale, and service of boilers. Sales of the B&W boilers relevant to the present litigation were made on a nationwide and worldwide

scale. Claims against B&W for exposure to asbestos during the relevant time period of 1979-80 were likewise filed throughout the United States and the world.

B&W is a corporation organized under the laws of Delaware. While at the time of contracting certain of its corporate offices had been relocated from New York to Louisiana, B&W's principal place of business was and remains Ohio, where the majority of its management, manufacture, and design operations are conducted, where the major portion of its employees reside, and where the bulk of its assets are located.

None of the defendant insurers has its place of incorporation or its principal place of business in either Louisiana or Ohio. Most of the defendant insurers, however, have obtained certificates of compliance with the insurance laws of Ohio and are licensed to conduct insurance business in the state.

In 1978, B&W became a subsidiary of J. Ray McDermott & Company (McDermott), a Louisiana-based corporation. While its nominal headquarters became located in Louisiana, B&W retained its separate corporate identity, and continued its major operations in Ohio. The responsibility for securing B&W's 1979-80 liability insurance coverage shifted to McDermott. Through its authorized Texas-based insurance broker, Adams & Porter Associates Inc., McDermott secured a multiple-layer comprehensive liability insurance policy for 1979-80 with defendant insurers on behalf of all its subsidiaries. However, specific and separate terms of coverage for B&W were individually considered and provided for in the otherwise

general insurance contract. The contract did not include any choice of law provision.

Subject to McDermott's approval, Adams & Porter negotiated the terms of the insurance contract with defendant insurers. Negotiations took place primarily in Texas, New York, and England. The defendant insurers ultimately executed the insurance policy at their respective offices, none of which was located in Louisiana or Ohio. The executed policy was assembled by Adams & Porter at its Texas office and delivered to McDermott at its New Orleans, Louisiana, office. Premiums on the policy were paid out of McDermott's office to Adams & Porter in Texas, which then distributed the proportionate shares of the premiums to the defendant insurers at their respective offices.

While B&W's parent corporation, through its authorized agent, obtained this secondary excess liability insurance coverage for B&W in the amount of 17.5 million dollars, B&W retained its own separate primary comprehensive general liability policy with Travelers Insurance Company in the amount of two million dollars, and a first layer of excess coverage with Creole Insurance Company Limited in the amount of $500,000. There is no dispute over the fact that the primary coverage with Travelers has been exhausted; B&W and Creole agree that the Creole first-layer excess coverage has likewise been exhausted and paid out in full. Defendants contend, however, that the first layer of excess coverage with Creole has not been exhausted, and that they are therefore not obligated to reimburse B&W for any claims paid.

The central point of dispute between the parties is the construction of the term "occurrence" as it is used in the secondary excess liability insurance contract with defendant insurers, and in the primary excess liability insurance contract between B&W and Creole. Although neither party offers any analysis of the respective constructions of this term under the laws of Ohio and Louisiana, the parties are in apparent agreement that the legal construction of this term would differ significantly depending upon which state's law is applied, and that the choice of the applicable law would be virtually dispositive of the respective rights of the parties under the contract.

The scope of coverage of the insurance contract with defendant insurers is as follows:

> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State, and Municipal or other qualified authority or in respect of such liabilities assumed by the Assured under contract or agreement, for "property damage" and "personal injuries", as defined herein resulting from an "occurrence" as defined herein.

The definition of the term "occurrence" is the same in both the contract with defendant insurers and the contract with Creole:

> The term "Occurrence", whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking

> place during the term of this contract in respect to all the Assured's operations.

Generally, there are three varying approaches taken by courts in construing the term "occurrence" under such a liability insurance policy. See Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount per Accident or Occurrence*, 64 ALR 4th 668 (1988). Of relevance herein are two of these approaches, which respectively look to either the cause or to the effect of injury to determine the number of occurrences for purposes of liability coverage.

B&W urges a construction of "occurrence" that defines it in terms of the underlying *cause* of the multiple asbestos-related injuries and resulting claims. Thus, as there was but one occurrence that caused the asbestos-related claims against B&W – the design and manufacture of asbestos-containing boilers – the total amount of money paid out in disposing of the numerous resulting claims is aggregated to determine whether the policy limits of the Creole primary excess liability coverage have been exhausted, and the threshhold of defendant insurers' secondary excess liability coverage has been reached. This approach to construing "occurrence" is taken by the vast majority of courts. *Id.; Michigan Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 374, 379 (6th Cir. 1984). For present purposes the court will presume, in the absence of any analysis of this issue by the parties, and in view of B&W's stance on the issue presently before the court, that Ohio law is in keeping with this majority approach.

Defendant insurers, on the other hand, espouse the minority view that "occurrence" is to be construed in terms of the ultimate *effect*, thus rendering each individual injury or claim a separate occurrence. Under this construction, defendant insurers' obligation to pay on any one of these claims is not triggered until liability for that claim exceeds the $500,000 policy limits of the Creole policy. Because the typical asbestos-related claim is allegedly disposed of for about $10,000, this would mean that defendant insurers would not be obligated to pay on any of the claims. For the reasons stated above, the court will presume that Louisiana law supports defendant insurers' construction of "occurrence". The court would note, however, that Louisiana courts are apparently in conflict over which approach to take. See 64 ALR 4th at 674, 680-81.

CHOICE OF LAW PRINCIPLES

In a diversity action, the district court is obliged to apply the choice of law rules of the state in which it sits. *Klaxon v. Stenton Electric Mfg. Co.*, 313 U.S. 487, 491, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Boyd v. LaMaster*, 927 F.2d 237 (6th Cir. 1991). This court must therefore apply Ohio choice of law rules.

For the present action, the determinative Ohio choice of law rules are set forth in *Nationwide Mut. Ins. Co. v. Ferrin*, 21 Ohio St. 3d 43, 487 N.E.2d 568 (1986), and *Gries Sports Enterprises, Inc. v. Modell*, 15 Ohio St. 3d 284, 473 N.E.2d 807 (1984), cert. denied 473 U.S. 906 (1985). Ohio choice of law rules mandate that the law of the state with the more significant relationship to the contract should

govern disputes arising from it. *National Union Fire Ins. v. Watts*, 963 F.2d 148 (6th Cir. 1992). To determine which state has the more significant relationship to the contract, Ohio law has adopted the test set forth in the Restatement (Second) of Conflict of Laws, Section 188. *Mccurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 822 (6th Cir. 1990); *Ferrin, supra; Modell, supra.*

> Section 188 states, in relevant part:
>
> (2) In the absence of an effective choice of law by the parties, * * * the contacts to be taken into account in applying the principles of [Section] 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The plain language of Restatement (Second) of Conflict of Laws Section 188, as adopted by Ohio case law, requires the court to consider the Section 188 factors in applying the general principles enunciated in Restatement (Second) of Conflict of Laws Section 6 to determine the law applicable to an issue. *Watts, supra.* Section 6 sets forth:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability, and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

As to the application of the above principles, the parties are not in dispute. The parties are in dispute, however, over whether under Ohio conflict of laws principles this court may apply the provisions of a related Restatement section, Section 193, and the comments thereto. Section 193 reads:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of

> the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in [Section] 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Comment *b* to Section 193 provides that "The location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state." Where no principal location of the risk can be determined, Comment *a* to Section 193 requires that the governing law be determined by application of the general principles set forth in Section 188.

Comment *f* to Section 193 deals specifically with "multiple risk" insurance policies of the type at issue in the present case. Comment *f* states, in part:

> *Multiple risk policies.* A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y, and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk. So, if the house located in state X were damaged by fire, it is thought that the court would determine the rights and obligations of the parties under the policy, at least

> with respect to most issues, in accordance with the local law of X. * * *

The principles governing the federal courts' determination of state law are summarized in *Grantham and Mann v. American Safety Products*, 831 F.2d 596, 608-609 (6th Cir. 1987):

> In diversity cases, the federal courts must apply state law "in accordance with the then controlling decision of the highest state court." * * * If the forum state's highest court has not addressed the issue, the federal court must ascertain from all available data, including the decisional law of the state's lower courts, restatements of law, law review commentaries, and decisions from other jurisdictions on the "majority" rule, what the state's highest court would decide if faced with the issue. * * * Nevertheless, although a decision by a lower state court is not controlling where the highest state court has not spoken, * * * the decision of "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." * * * (Citations and emphases omitted).

ANALYSIS

Plaintiff urges this court to find that Section 193, which emphasizes the principal location of the insured risk as the primary factor in determining the controlling law, would be adopted by Ohio courts if they were presented with the issue herein. Plaintiff further contends

that, under Section 193, Ohio is the state with the more significant relationship with respect to the construction of the terms of the liability insurance contract because Ohio is the principal location of the insured risk, i.e., the situs of the major portion of the operations and assets of Babcock & Wilcox.

Defendant insurers contest the assertion that Ohio is the principal location of the insured risk. Defendants contend that Section 193 cannot be applied in the present case because no Ohio court has as yet adopted it, and indications are that Ohio courts would not adopt it; alternatively, defendants contend that Section 193 is inapplicable to the present facts by its own terms. Ultimately, defendants argue that the application of the principles enumerated in Section 6 and Section 188 mandates a finding that Louisiana law is controlling, in that Louisiana was the principal place of contracting, and because the goals of uniformity and predictability will be best served by application of Louisiana law.

Location of the Insured Risk

Our first inquiry is to determine whether or not Ohio is the principal location of the insured risk in the present case. If not, then the question of whether or not Ohio courts would adopt Section 193 would be rendered moot, as our analysis in that case would be confined to the application of the principles set forth in Section 6 and Section 188. See, e.g., *General Acc. Ins. Co. v. Insurance Co. of North America* (1990), 69 Ohio App. 3d 52, 590 N.E.2d 33; *Compagnie des Bauxites v. Argonaut-Midwest Ins.*, 880

F.2d 685, 690 (3rd Cir. 1989); *Sandefer Oil & Gas v. Aig Oil Rig of Texas, Inc.*, 846 F.2d 319, 324 (5th Cir. 1988).

Plaintiff's theory is that the "insured risk" in the present contract is the risk of loss to the insured, i.e., the risk of depletion of the insured's assets as a result of liability for claims made against it. Under this view, since Ohio is the principal location of the insured's assets, Ohio is therefore the principal location of the insured risk.

Although B&W cites no cases where "insured risk" is expressly construed in this manner, it finds some support for this approach through extrapolation of the language and holdings in a handful of cases: *Republic-Franklin Ins. Co. v. Progressive Casualty Ins. Co.* (1976), 45 Ohio St. 2d 93, 95, 341 N.E.2d 600 ("A liability insurance policy is written for the protection of the insured."); *Eagle-Pilcher Industries v. Liberty Mutual Ins. Co.*, 829 F.2d 227, 248 (1st Cir. 1987) (Ohio law applied in insurance coverage dispute over asbestos-related claims because the question of whether an Ohio manufacturer "is entitled to reimbursement, and to what extent, for the many millions of dollars in claims paid as a result of injuries caused by its products is of major concern to the state in which the business is domiciled."); *Unigard Security Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 589 (S.D.N.Y. 1991) ("In the mass tort context, the state where the insured is located has been held to be the state having the greatest interest in the application of its law concerning insurance coverage.").

Defendants contend, on the other hand, that the "insured risk" is the risk of claims being made against the insured. Since claims for asbestos-related injury have

arisen against B&W nationwide and worldwide, and since the contract explicitly provides coverage for the insured regardless of the geographical location of the claim, there is no one state that can be regarded as the principal location of the insured risk. In support of this construction, defendants cite several cases, the chief ones being *General Acc. Ins. Co., supra; Compagnie des Bauxite, supra;* and *Sandefer Oil & Gas, supra.* As with the cases cited by plaintiff, none of these cases expressly construe "insured risk" in the manner proposed; at best, these cases implicitly presume without any analysis of the issue that the situs of the insured risk is determined by where the injury occurred and/or the claim was filed.

The equation of "insured risk" with claims made appears appropriate enough where one of the issues is the insurer's duty to defend against claims wherever they may arise. See, e.g., *General Acc. Ins. Co., supra.* However, such an approach has little value in the present case, where the contract expressly states that the insurers "shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured . . . ". Under the terms of the present contract, rather than an obligation to defend against claims, the insurers have "the right and shall be given the opportunity" to involve themselves in the defense of claims that may affect their interests. In such event, their only obligation is to "cooperate" in the defense of claims against the insured.

The ultimate issue herein is whether the insured is entitled to coverage for claims that allegedly continue to be filed and for reimbursement of funds already expended in payment of claims against it, i.e., whether it

is entitled to protection and restoration of its assets. In this context, and where there is no duty to defend, the fact that claims have been filed in numerous jurisdictions, and the fact that performance under the contract has no geographical limitations, are largely irrelevant.

Essentially, the only performance by the insurers that is called for by the contract is to pay, to the "Assured which sustains the loss", all sums for which that insured becomes liable as a result of the occurrences covered in the contract. Thus, the true subject matter of the contract is the protection of the assets of each individual insured. The risk insured against for B&W is not the risk of claims being made against B&W, but the risk of claims being paid for by B&W and the resulting depletion of its assets. Therefore, the principal location of the insured risk insofar as B&W is concerned is the principal location of that insured's assets – Ohio.

Application of Section 193

Defendants assert that Section 193 should not be applied in the present case because the Supreme Court of Ohio has implicitly rejected application of Section 193 in *Ferrin, supra*. However, the court finds no support for this contention in that case. There is simply no basis for defendants' claim that the Supreme Court of Ohio "passed over the opportunity" to adopt Section 193 in *Ferrin* by virtue of its application therein of Section 188 to determining the governing law for a contract of liability insurance. There is no mention of Section 193 in that case, no indication that the parties ever raised the issue of its applicability, and not even so much as a hint that the court considered it in any way. As B&W aptly points out,

there would have been no need in *Ferrin* to consider the applicability of Section 193, as the same result would have been reached in that case through application of either Section 193 or Section 188.

Defendants further contend that no Ohio court has as yet applied or followed Section 193. This contention is also without merit. While the appellate court in *General Accident Ins., supra,* decided the choice of law issue under the principles of Section 188, it did so because of the particular facts of that case, i.e., there was no principal location of the insured risk. Although the court rejected the contention that Maryland law should be held to be controlling under Section 193, there was no objection to nor rejection of Section 193 in principle. Indeed, the court's language and analysis makes it clear that it actually *followed* Section 193 in determining the governing law in that case. After quoting extensively from Section 193 and Section 188, and then stating that it was "[a]pplying the foregoing", the court determined whether or not there was a principal location of the insured risk and, having found none, turned to an analysis under the more general principles of Section 188. The court's analysis was thus in accordance with the precepts of Section 193, Comment *a.*

Next, defendants argue that, even if Ohio courts would follow Section 193, it is inapplicable to the present case by its own terms. Defendants point out that Section 193 requires that there be 1) a principal location of the insured risk; 2) an understanding between the parties as to the principal location of the insured risk; and 3) no other state with a more significant relationship to the transaction and the parties under the principles stated in Section 6.

We have already determined that there is a principal location of the insured risk insofar as B&W is concerned, and that is Ohio. The question of whether Louisiana has a more significant relationship to the transaction and the parties with respect to the contested issue will be discussed more fully *infra;* for present purposes, however, we state our conclusion that Louisiana does not have the more significant relationship under the principles stated in Section 6.

As for the remaining factor, the understanding of the parties as to the principal location of the insured risk, defendants err in regarding this as requiring, in effect, a mutual understanding that is tantamount to an express agreement on the issue. Virtually identical language in Comment *c* to Section 193 and Comment *e* to Section 188 shows that the understanding spoken of is to be loosely construed: " . . . it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the risk is to be principally located would be applied to determine many of the issues arising under the contract." Restatement (Second) of Conflict of Laws, Section 193, Comment *c.*

Defendants also take issue with Comment *f* to Section 193, regarding multiple risk policies. Defendants claim that the "divide the risks" approach to such policies of Comment *f,* which suggests that the law of the principal location of each individual insured risk should control in the determination of insurance disputes regarding that risk, would violate the principles of Section 6 regarding consideration for certainty, predictability, and uniformity of result, and the justified expectations of the parties in

that regard. A similar viewpoint is expressed in dicta in *Westinghouse Electric Corp. v. Liberty Mutual Ins. Co.*, 559 A.2d 435 (N.J.Super.A.D. 1989), upon which defendants primarily rely:

> * * * [W]hen comprehensive nationwide coverage is purchased, it is surely the expectation of both insured and insurer that what the insurer has bought and what the insurer has sold is a single protection from liability irrespective of the particular state law under which that liability is determined so long as the risk, whether or not ultimately resulting in liability, is within the policy coverage. * * * In our view, the notion that the insured's rights under a single policy vary from state to atate [sic] state depending on the state in which the claim invoking the coverage arose contradicts not only the reasonable expectations of the parties but also the common understanding of the commercial community. It also seems to us anomalous, in conflict of law terms, to suggest that more than one body of law will apply to a single contract. The theme running through the federal mega-coverage cases is the assumption not only that state law will determine whose insurance law will govern the coverage dispute but also that it will be a single state's law chosen in accordance with applicable conflict principles of the forum. * * *

Id. at 442. Defendants cite a handful of federal district court cases that have cited this language from *Westinghouse* in reaching similar conclusions. See *Potomac Electric Power Co. v. California Union Ins. Co.*, 777 F.Supp. 968 (D.D.C. 1991); *National Starch and Chemical Corp. v. Great American Ins. Co.*, 743 F.Supp. 318 (D.N.J. 1990); *CPC*

International, Inc. v. Northbrook Excess & Surplus Ins. Co., 739 F. Supp. 710 (D.R.I. 1990).

The relevance of these cases to the present action is questionable, in that B&W is not advocating the application of the laws of numerous states depending on where the claims arose, which is at the heart of the controversy in these cases. Rather, B&W's argument is consistent with their rulings in its emphasis on the application of the law of a single state, and in its assertion that the law of the insured's principal place of business, i.e., the principal location of the insured risk, be applied.

Furthermore, defendants' reliance on *Westinghouse* in support of this argument is also questionable, as the same appellate court that decided *Westinghouse* later criticized and rejected its reasoning. See *Johnson Matthey Inc. v. Pennsylvania Manufacturers' Assoc. Ins. Co.*, 593 A.2d 367 (N.J.Super.A.A. [sic] 1991); *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Assoc. Ins. Co.*, 603 A.2d 61 (N.J.Super.A.D. 1992). As stated by the court:

> In *Johnson Matthey*, we explained our disagreement with *Westinghouse*. In short, we concluded that nationwide uniformity of policy interpretation was an illusory goal, not truly achievable or necessarily preferable. If it is associated with the place of contract, it is associated with an arbitrary and usually irrelevant choice which [section] 193 of the *Restatement* discards. Site-specific uniformity, on the other hand, is achievable, and represents a choice of the law of the jurisdiction that is most concerned with the outcome.

Gilbert Spruance, supra, at 64. The court went on to make the following observation, which is most pertinent to the present claim of concern for certainty, predictability, and uniformity of result:

> If the parties to an insurance contract truly prize uniform interpretation of multistate insurance policy language, they can frequently achieve it by expressing a choice of law in the contract. * * * Their failure to express such a choice tends to show that uniform interpretation was not a conscious goal of the contracting parties.

Id. at 64-65.

In any event, there is little danger of nonuniform interpretation of the contract through application of Comment *f* of Section 193 in the present case, as we have already rejected the contention that the place of the insured risk in the present case is wherever the claims arose. Comment *f* is useful and relevant for our present purposes insofar as it lends support for a separate consideration of B&W's insurance coverage apart from that of the parent corporation and the other subsidiaries. Such an approach is entirely consistent with – and all but expressly called for by – the terms of the contract itself, which throughout treats B&W separately and individually, while for the most part treating the remaining insureds collectively.

Defendants point out that in *Westinghouse,* et al, it is the law of the principal place of business of the corporate parent that is held to be controlling. To the extent that this is accurate, however, it appears to be the result of coincidence, reached through the requisite case-by-case weighing of all relevant factors, rather than the result of a

determination as a matter of law that the law of the principal place of business of the corporate parent is controlling in a dispute between its corporate subsidiary and their common insurer. Under the present facts and circumstances, B&W is better regarded as the separate corporation that it is, and McDermott, its corporate parent, is better regarded merely as B&W's agent for purposes of procuring its individualized insurance policy.

The court finds plaintiff's analysis of the question of whether Ohio courts would adopt and follow Section 193 to be persuasive. There is no inherent conflict between Section 193 and Sections 6 and 188. Rather, under the scheme of the Restatement (Second), Sections 189 through 197 are essentially subsections of Section 188, and act as models for the application of the principles of Section 188 to particular types of contracts:

> * * * These contracts are given special attention because it is considered possible to state with respect to each that, in the absence of an effective choice of law by the parties, a particular contact plays an especially important role in the determination of the state of the applicable law. * * *

Introductory Note to Title B of Chapter Eight, Restatement (Second) of Conflict of Laws. Where Section 6 states general principles applicable to all issues of choice of law, and Section 188 states general principles applicable to choice of law issues regarding contracts, Sections 189-197 state specific principles applicable to particular types of contracts. Thus, these sections together form a continuous and harmonious scheme for the analysis of choice of law questions regarding contract disputes.

The court can find no justification for concluding that Ohio courts, having adopted Sections 6 and 188, would reject the application of their integrally related subsections if faced with factual situations where they would be applicable. The court therefore finds that Ohio courts would adopt and apply Section 193 under the facts of the present case.

Analysis Under Sections 6 and 188

Even if Ohio courts would for some reason reject the application of Section 193 under the present facts, an analysis of these facts under Sections 6 and 188 yields the same result – that Ohio law should control the resolution of the present dispute.

Of the factors listed in Section 6, the most pertinent to the present inquiry are subsections (2)(b) and (c), which prescribe an examination and balancing of the relative policies of the forum state and other interested states in the determination of the issue in dispute. Comment *f* to Section 6 states that "In general, it is fitting that the state whose interests are most deeply affected should have its local law applied." While Ohio's interests in the resolution of this dispute are substantial, Defendants fail to present any correspondingly significant interests on the part of Louisiana that would compel the application of its law.

As established earlier, subsections (2)(d) and (f), regarding the expectations of the parties and the uniformity of result, are of little weight in the present case.

Under subsection (2)(g), the court should take into consideration the ease in determination and application of the law to be applied. The court has not had the benefit of any analyses or arguments regarding the ultimate issue of the construction under Ohio and Louisiana law of the term "occurrence". A preliminary inquiry, however, indicates that neither state has as yet definitively ruled on this issue. Since the courts in Louisiana are apparently in conflict, see 64 ALR4th 668, the determination of Louisiana law on this issue poses some difficulties. We have found no Ohio cases that have directly addressed the present issue, although at least one Ohio appellate court has adopted the general principle that the term "occurrence" in a liability insurance contract should be construed broadly and liberally in favor of extending coverage to the insured. *Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co.* (1984), 17 Ohio App. 3d 127, 132, 477 N.E.2d 1227. Although this in itself is not conclusive of Ohio law on this issue, it is persuasive precedent. Thus, the factor of the ease of determination of the law to be applied tends to favor Ohio.

Turning to the more specific factors listed in Section 188, we find that these also favor application of Ohio law. Of greatest significance is subsection (d), the location of the subject matter of the contract. Comment *e* to Section 188 makes it clear that the "subject matter" of the contract is equated with the "insured risk", in accord with the principles of Section 193.

Subsection (e) lends futher [sic] support to the conclusion that Ohio is the state with the more significant contacts. None of the defendant insurers has any significant contact with either Louisiana or Ohio in terms of

domicile, residence, place of incorporation, or principal place of business, although most of the insurers are authorized to conduct insurance activities in both states. While B&W's place of incorporation is Delaware, and while it maintains a nominal residence in Louisiana, its domicile, principal residence, and principal place of business is in Ohio.

As used in the Restatement, "the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect . . . ". Comment *e* to Section 188, Restatement (Second) of Conflict of Laws. Assuming, as defendants suggest, that the ultimate delivery of the contract to McDermott in Louisiana was the last act necessary to make the contract binding, then Louisiana would be the place of contracting. However, Comment *e* to Section 188 places this factor in proper perspective:

> Standing alone, the place of contracting is a relatively insignificant contact. To be sure, in the absence of an effective choice of law by the parties, issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. The place of contracting, in other words, rarely stands alone and, almost invariably, is but one of several contacts in the state. Usually, this state will be the state where the parties conducted the negotiations which preceded the making of the contract. Likewise, this state will

> often be the state of the parties' common domicil [sic] as well. By way of contrast, the palce [sic] of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip.

While Ohio may still adhere in theory to the general principle that the law of the state where the contract is made governs interpretation of the contract, see *Ferrin, supra,* at 44, the adoption of Section 188 dictates that this general principle is applicable only when no other significant factors outweigh the place of contracting. Such is not the case here.

In the present case, assuming that Louisiana is the place of contracting, this factor stands alone as the only significant contact with Louisiana. There is no common domicile between B&W and any of the defendants. Although some consultations regarding negotiations may have taken place between McDermott in Louisiana and Adams & Porter in Texas, negotiations were conducted primarily in states and fora other than Louisiana or Ohio. Comment *e* makes it clear that, under such circumstances, the place of negotiations is likewise of little significance:

> The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and the agreement reached. This contact is of less importance when there is no one single place of negotiation

> and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.

Lastly, the place of performance, subsection (c) to Section 188, is of no bearing in the present case. The only performance at issue herein is defendants' duty to pay B&W under the terms of the contract. In this day of computerized banking and electronic transfers, the place where payment is to be made or received is of little, if any, real significance.

In sum, an analysis of the present facts under Sections 6 and 188 leads to the conclusion that Ohio is the state with the more significant contacts, and that Ohio law should control the resolution of the present dispute.

Constitutionality of Applying Ohio Law

Defendants' final objection to the application of Ohio law is that it would be unconstitutional, because Ohio allegedly has no " . . . significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Based on our analysis above, the court finds no merit in this contention.

CONCLUSION

The court finds that Ohio is the state with the more significant contacts with the parties and issues raised in the present case, and that therefore Ohio law will be applied.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

Nos. 93-4149/4150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE BABCOCK & WILCOX COMPANY, Plaintiff-Appellant/ Cross-Appellee, v. ARKWRIGHT-BOSTON MFG. MUTUAL INSURANCE COMPANY, ET AL., Defendants-Appellees/ Cross-Appellants, CREOLE INSURANCE COMPANY, LTD., Defendant-Appellant/ Cross-Appellee, MCDERMOTT, INC., Third Party Defendant Appellant/Cross-Appellee	ORDER (Filed Aug. 4, 1995)

BEFORE: KENNEDY and NORRIS, Circuit Judges; and TAYLOR,* District Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having

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* Hon. Anna Diggs Taylor, United States District Judge for the Eastern District of Michigan, sitting by designation.

requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

Mr. Peter J. Kalis
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, PA 15222

PETITIONS FOR CERTIORARI RAISING QUESTIONS ABOUT THE DETERMINATION OF STATE LAW UNDER ERIE R.R. CO. V. TOMPKINS

Windham v. First Gibraltar Bank FSB, No. 95-195, *cert. pending*

National Fid. Life Ins. Co. v. Chadima, No. 95-166, *cert. denied*, 1995 WL 455033 (U.S. Oct. 2, 1995)

Transcraft Corp. v. Liberty Mut. Ins. Co., No. 94-1597, *cert. denied*, 115 S. Ct. 1990 (1995)

Joslyn Mfg. Co. v. Liberty Mut. Ins. Co., No. 94-978, *cert. denied*, 115 S. Ct. 935 (1995)

Richards v. Michelin Tire Corp., No. 94-906, *cert. denied*, 115 S. Ct. 902 (1995)

Murray v. National Broadcasting Co., No. 94-866, *cert. denied*, 115 S. Ct. 734 (1995)

Chicago Bd. of Educ. v. Affiliated FM Ins. Co., No. 94-436, *cert. denied*, 115 S. Ct. 425 (1994)

General Elec. Capital Corp. v. National Union Fire Ins. Co., No. 94-58, *cert. denied*, 115 S. Ct. 293 (1994)

Madsen v. Allstate Ins. Co., No. 92-981, *cert. denied*, 113 S. Ct. 1264 (1993)

Bezanson v. Metropolitan Ins. & Annuity Co., No. 91-1727, *cert. denied*, 505 U.S. 1205 (1992)

Rally's Inc. v. International Shortstop Inc., No. 91-824, *cert. denied*, 502 U.S. 1059 (1992)

F L Aerospace Corp. v. Aetna Casualty & Sur. Co., No. 90-289, *cert. denied*, 498 U.S. 911 (1990)

Mendel v. Silver, No. 89-1645, *cert. denied*, 496 U.S. 926 (1990)

Southwest Forest Indus. Inc. v. Sutton, No. 89-1165, *cert. denied*, 494 U.S. 1017 (1990)

Hearn v. State Farm Mut. Auto. Ins. Co., No. 89-221, *cert. denied*, 493 U.S. 855 (1989)

Borden Inc. v. Affiliated FM Ins. Co., No. 88-1986, *cert. denied*, 493 U.S. 817 (1989)

Nemours Found. v. Pierce Assocs. Inc., No. 88-1790, *cert. denied*, 492 U.S. 907 (1989)

Marine Bank of Springfield v. Hendrickson, No. 87-1977, *cert. denied*, 488 U.S. 822 (1988)

Suggs v. State Farm Fire & Casualty Co., No. 87-1536, *cert. denied*, 486 U.S. 1007 (1988)

Honeywell Inc. v. Luzzader, No. 87-1524, *cert. denied*, 485 U.S. 1035 (1988)

Loengard v. Santa Fe Indus. Inc., No. 87-1504, *cert. denied*, 485 U.S. 1034 (1988)

Devon Bank v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 87-1426, *cert. denied*, 485 U.S. 1008 (1988)

Aloe Coal Co. v. Clark Equipment Co., No. 87-182, *cert. denied*, 484 U.S. 853 (1987)

Wilson v. Pogo Producing Co., No. 84-1390, *cert. denied*, 471 U.S. 1054 (1985)

Shell Oil Co. v. Williams, No. 82-692, *cert. denied*, 459 U.S. 1087 (1982)

Aetna Casualty & Sur. Co. v. Porter, No. 81-200, *cert. denied*, 455 U.S. 1009 (1982)

Travelers Ins. Co. v. Fenasci, No. 81-545, *cert. denied*, 454 U.S. 1123 (1981)

Ortho Pharmaceutical Corp. v. McKenna, No. 80-308, *cert. denied*, 449 U.S. 976 (1980)

Vagle v. Picklands Mather & Co., No. 79-773, *cert. denied*, 444 U.S. 1033 (1980)

Ranger Ins. Co. v. Culberson, No. 71-1365, *cert. denied*, 407 U.S. 916 (1972)